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ELECTION COMMISSION, INDIA

NOTIFICATION

New Delhi, the 24th December 1954

S.R.O. 180.—In continuation of the Election Commission's Notification No. 19/180/52-Elec.III/4325, dated the 7th April, 1953 (S.R.O. 688), published in the *Gazette of India Extraordinary*, dated the 15th April, 1953, under section 106 of the Representation of the People Act, 1951 (XLIII of 1951), the Election Commission hereby publishes the judgment of the Supreme Court of India delivered by it on the 9th December, 1954, on the appeal filed before that Court by Shri Hari Vishnu Kamath son of Shri Rama Kamath, resident of Dhantoli, Nagpur, Tahsil and District Nagpur, from the Judgment and Order, dated 4th November, 1953, of the Nagpur High Court in Civil Petition No. 174 of 1953 (Appendix I) (Election Petition No. 180 of 1952 before the Election Tribunal, Hoshangabad).

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 61 OF 1954

Hari Vishnu Kamath—*Appellant*

Versus

Syed Ahmed Syed Isak and others—*Respondents.*

JUDGMENT

VENKATARAMA AIYAR, J.—The appellant and respondents 1 to 5 herein were duly nominated for election to the House of the People from the Hoshangabad Constituency in the State of Madhya Pradesh. Respondents 4 and 5 subsequently withdrew from the election, leaving the contest to the other candidates. At the polling the appellant secured 65,201 votes, the first respondent 65,375 votes and the other candidates far less; and the Returning Officer accordingly declared the first respondent duly elected. The appellant then filed Election Petition No. 180 of 1952 for setting aside the election on the ground *inter alia* that 301 out of the votes counted in favour of the first respondent were liable to be rejected under Rule 47(1)(c) of Act No. 43 of 1951 on the ground that the ballot papers did not have the distinguishing marks prescribed under Rule 28, and that by reason of their improper reception, the result of the election had been materially affected. Rule 28 is as follows:

> "The ballot papers to be used for the purpose of voting at an election to which this Chapter applies shall contain a serial number and such distinguishing marks as the Election Commission may decide."

Under this rule, the Election Commission had decided that the ballot papers for the Parliamentary Constituencies should bear a green bar printed near the left margin, and that those for the State Assembly should bear a brown bar.

What happened in this case was that voters for the House of the People in polling stations Nos. 316 and 317 in Sobhapur were given ballot papers with brown bar intended for the State Assembly, instead of ballot papers with green bar which had to be used for the House of the People. The total number of votes so polled was 443, out of which 62 were in favour of the appellant, 301 in favour of the first respondent, and the remaining in favour of the other candidates. Now, Rule 47(1)(c) enacts that "a ballot paper contained in a ballot box shall be rejected if it bears any serial number or mark different from the serial numbers or marks of ballot papers authorised for use at the polling station or the polling booth at which the ballot box in which it was found was used". In his election petition, the appellant contended that in accordance with this provision the ballot papers received at the Sobhapur polling stations not having the requisite mark should have been excluded, and that if that had been done, the first respondent would have lost the lead of 174 votes, and that he himself would have secured the largest number of votes. He accordingly prayed that he might be declared duly elected.

The first respondent contested the petition. He pleaded that the Returning Officer at Sobhapur had rightly accepted the 301 votes, because Rule 47 was directory and not mandatory, and that further the votes had been accepted as valid by the Election Commission, and the defect, if any, had been cured. He also filed a recrimination petition under section 97 of Act No. 43 of 1951, and therein pleaded *inter alia* that at polling station No. 299 at Malkajra and at polling station No. 371 at Bammangaon ballot papers intended for use in the State Legislature election had been wrongly issued to voters to the House of People by mistake of the polling officers, that all those votes had been wrongly rejected by the Returning Officer, and that if they had been counted, he would have got 117 votes more than the appellant. He accordingly challenged the right of the appellant to be declared elected.

The Election Tribunal held by a majority that Rule 47(1)(c) was mandatory, and that the 301 ballot papers found in the box of the first respondent bearing the wrong mark should not have been counted; while the third Member was of the opinion that that rule was merely directory, and that the Returning Officer had the power to accept them. The Tribunal, however, was unanimous in holding that the result of the election had not been materially affected by the erroneous reception of the votes, and on that ground dismissed the petition.

The appellant then moved the High Court of Nagpur under Articles 226 and 227 of the Constitution for the issue of a writ of certiorari or other order or direction for quashing the decision of the Election Tribunal on the ground that it was illegal and without jurisdiction. Apart from supporting the decision on the merits, the first respondent contended that having regard to Article 329(b) the High Court was not competent to entertain the petition, as in substance it called in question the validity of an election. The petition was heard by a Bench consisting of Sinha, C.J., Mudholkar and Bhutt, JJ., who differed in their conclusions. Sinha, C.J. and Bhutt, J. held that no writ could be issued under Article 226, firstly because the effect of Article 329(b) was to take away that power, and secondly, because the Election Tribunal had become *functus officio* after the pronouncement of the decision, and that thereafter there was no Tribunal to which directions could be issued under that Article. Mudholkar, J. agree with this conclusion, but rested it on the second ground aforesaid. As regards Article 227, while Sinha, C.J. and Bhutt, J. held that it had no application to Election Tribunals, Mudholkar, J. was of the view that they were also within the purview of that Article, but that in view of Article 329(b), no relief could be granted either setting aside the election of the first respondent, or declaring the appellant elected, and that the only order that could be made was to set aside the decision of the Tribunal. On the merits, Sinha, C.J. and Bhutt, J. took the view that the decision of the Tribunal that the result of the election had not been materially affected by the erroneous reception of votes was one within its jurisdiction, and that it could not be quashed under Article 226, even if it had made a mistake of fact or law. But Mudholkar, J. held that as in arriving at that decision the Tribunal had taken into consideration irrelevant matters, such as the mistake of the polling officer in issuing wrong ballot papers and its effect on the result of the election, it had acted in excess of its jurisdiction. He was accordingly of opinion that the decision should be quashed leaving it to the Election Commission "to perform their statutory duties in the matter of the election petition". The petition was dismissed in accordance with the majority opinion. The learned Judges, however, granted a certificate under Article 132(1), and that is how this appeal comes before this Court.

The first question that arises for decision in this appeal is whether High Courts have jurisdiction under Article 226 to issue writs against decisions of

Election Tribunals. That Article confers on High Courts power to issue appropriate writs to any person or authority within their territorial jurisdiction, in terms absolute and unqualified, and Election Tribunals functioning within the territorial jurisdiction of the High Courts would fall within the sweep of that power. If we are to recognise or admit any limitation on this power, that must be founded on some provision in the Constitution itself. The contention of Mr. Pathak for the first respondent is that such a limitation has been imposed on that power by Article 329(b), which is as follows:

> "Notwithstanding anything in this Constitution—no election to either House or Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature."

Now, the question is whether a writ is a proceeding in which an election can properly be said to be called in question within the meaning of Article 329(b). On a plain reading of the Article, what is prohibited therein is the *initiation* of proceedings for setting aside an election otherwise than by an election petition presented to such authority and in such manner as provided therein. A suit for setting aside an election would be barred under this provision. In N. P. Ponnuswami *Vs.* Returning Officer, Namakkal Constituency and others* it was held by this Court that the word "election" in Article 329(b) was used in a comprehensive sense as including the entire process of election commencing with the issue of a notification and terminating with the declaration of election of a candidate, and that an application under Article 226 challenging the validity of any of the acts forming part of that process would be barred. These are instances of original proceedings calling in question an election, and would be within the prohibition enacted in Article 329(b). But when once proceedings have been instituted in accordance with Article 329(b) by presentation of an election petition, the requirements of that Article are fully satisfied. Thereafter when the election petition is in due course heard by a Tribunal and decided, whether its decision is open to attach, and if so, where and to what extent, must be determined by the general law applicable to decisions of Tribunals. There being no dispute that they are subject to the supervisory jurisdiction of the High Courts under Article 226, a writ of certiorari under that Article will be competent against decisions of the Election Tribunals also.

The view that Article 329(b) is limited in its operation to initiation of proceedings for setting aside an election and not to the further stages following on the decision of the Tribunal is considerably reinforced, when the question is considered with reference to a candidate, whose election has been set aside by the Tribunal. If he applies under Article 226 for a writ to set aside the order of the Tribunal, he cannot in any sense be said to call in question the election; on the other hand, he seeks to maintain it. His application could not, therefore, be barred by Article 329(b). And if the contention of the first respondent is well-founded, the result will be that proceedings under Article 226 will be competent in one even and not in another and at the instance of one party and not the other. Learned counsel for the first respondent was unable to give any reason why this differentiation should be made. We cannot accept a construction which leads to results so anomalous.

This question may be said to be almost concluded by authority. In Durga Shankar *Vs.* Raghurai Singh†, the contention was raised that this Court could not entertain an appeal against the decision of an Election Tribunal under Article 136 of the Constitution, as that would be a proceeding in which an election is called in question, and that that could be done only before a Tribunal as provided in Article 329(b). In overruling this contention, Mukherjee, J. observed:

> "The 'non-obstante' clause with which Article 329 of the Constitution begins and upon which the respondent's counsel lays so much stress, debars us, as it debars any other court in the land, to entertain a suit or a proceeding calling in question any election to the Parliament or the State Legislature. It is the Election Tribunal alone that can decide such disputes and the proceeding has to be initiated by an election petition and in such manner as may be provided by a statute. But once that Tribunal has made any determination or adjudication on the matter, the powers of this court to interfere by way of special leave can always be exercised."

*1952 S.C.R. 218.
†A. I.R. 1954 S.C. 520.

By parity of reasoning it must be held that the power of the High Court under Article 226 to issue writ of certiorari against decisions of Election Tribunals remains equally unaffected by Article 329(b).

It is next contended that even if there is jurisdiction in the High Court under Article 226 to issue certiorari against a decision of an Election Tribunal, it is incapable of exercise of the reason that under the scheme of Act No. 43 of 1951, the Tribunal is an *ad hoc* body set up for determination of a particular election petition, that it becomes *functus officio* when it pronounces its decision, and that thereafter there is no authority in existence to which the writ could be issued. The question thus raised is of considerable importance, on which there is little by way of direct authority; and it has to be answered primarily on a consideration of the nature of a writ of certiorari to quash. At the outset, it is necessary to mention that in England certiorari is issued not only for quashing decisions but also for various other purposes. It is issued to remove actions and indictments pending in an inferior court for trial to the High Court; to transfer orders of civil courts and sentences of criminal courts for execution to the superior court; to bring up depositions on an application for bail when the prisoner has been committed to the High Court for trial; and to remove the record of an inferior court when it is required for evidence in the High Court. These are set out in Halsbury's Laws of England, Volume IX, pages 840 to 851. It is observed therein that the writ has become obsolete in respect of most of these matters, as they are now regulated by statutes. That that is also the position in America appears from the following statement in Corpus Juris Secundum, Volume 14, at page 151:

> "At common law the writ of certiorari was used both as a writ of review after final judgment and also to remove the entire cause at any stage of the proceeding for hearing and determination in the superior court. In the United States it is now the general rule that the writ will be refused where there has been no final determination and the proceedings in the lower tribunal are still pending."

As we are concerned in this appeal with certiorari to quash a decision, it is necessary only to examine whether having regard to its nature such a writ for quashing can issued to review the decision of a Tribunal, which has ceased to exist.

According to the common law of England, certiorari is a high prerogative writ issued by the Court of the King's Bench or Chancery to inferior courts or tribunals in the exercise of supervisory jurisdiction with a view to ensure that they acted within the bounds of their jurisdiction. To this end, they were commanded to transmit the records of a cause or matter pending with them to the superior court to be dealt with there, and if the order was found to be without jurisdiction, it was quashed. The court issuing certiorari to quash, however, could not substitute its own decision on the merits, or give directions to be complied with by the court or the tribunal. Its work was destructive; it simply wiped out the order passed without jurisdiction, and left the matter there. In T. C. Basappa Vs. T. Nagappa*, Mukherjea, J. dealing with this question observed:

> "In granting a writ of 'certiorari' the superior court does not exercise the power of an appellate tribunal. It does not review or reweigh the evidence upon which the determination of the inferior tribunal purports to be based. It demolishes the order which it considers to be without jurisdiction or palpably erroneous but does not substitute its own view for those of the inferior tribunal. The offending order or proceeding so to say is put out of the way as one which should not be used to the detriment of any person. *Vide* per Lord Cairns in *Walsall's* Overseers *Vs.* L. and N.W. Ry. Co.†".

In Corpus Juris Secundum, Volume 14 at page 123 the nature of a writ of certiorari for quashing is thus stated:

> "It is not a proceeding against the tribunal or an individual composing it; it acts on the cause or proceeding in the lower court, and removes it to the superior court for reinvestigation."

The writ for quashing is thus directed against a record, and as a record can be brought up only through human agency, it is issued to the person or authority whose decision is to be reviewed. If it is the record of the decision that has to be removed by certiorari, then the fact that the tribunal has become *functus officio* subsequent to the decision could have no effect on the jurisdiction of the court to remove the record. If it is a question of issuing directions, it is conceivable that there should be in existence a person or authority to whom they

*A.I.R. 1954 S.C. 440. †(1879) 4. A.C. 30, 39.

could be issued, and when a certiorari other than one to quash the decision is proposed to be issued, the fact that the tribunal has ceased to exist might operate as a bar to its issue. But if the true scope of certiorari to quash is that it merely demolishes the offending order, the presence of the offender before the court, though proper, is not necessary for the exercise of the jurisdiction or to render its determination effective.

Learned counsel for the first respondent invites our attention to the form of the *order nisi* in a writ of certiorari, and contends that as it requires the court or tribunal whose proceedings are to be reviewed, to transmit the records to the superior court, there is, if the tribunal has ceased to exist, none to whom the writ could be issued and none who could be compelled to produce the record. But then, if the writ is in reality directed against the record, there is no reason why it should not be issued to whosoever has the custody thereof. The following statement of the law in Ferris on the Law of Extraordinary Legal Remedies is apposite:—

> "The writ is directed to the body or officer whose determination is to be reviewed, or to *any other person having the custody of the record or other papers to be certified.*"

Under section 103 of Act No. 43 of 1951 the tribunal is directed to send the records of the case after the order is pronounced either to the relative District Judge or to the Chief Judge of the Court of Small Causes, and there is no legal impediment to a writ being issued to those officers to transmit the record to the High Court. We think that the power to issue a writ under Article 226 to a person as distinct from an authority is sufficiently comprehensive to take in any person who has the custody of the record, and the officers mentioned in section 103 of Act No. 43 of 1951 would be persons who would be amenable to the jurisdiction of the High Court under the Article.

It is argued that the wording of Article 226 that the High Court shall have power to issue writs or directions to any person or authority within its territorial jurisdiction posits that there exists a person or authority to whom it could be issued, and that in consequence, they cannot be issued where no such authority exists. We are of opinion that this is not the true import of the language of the Article. The scope of Article 226 is firstly that it confers on the High Courts power to issue writs and directions, and secondly, it defines the limits of that power. This latter it does by enacting that it could be exercised over any person or authority within the territories in relation to which it exercises its jurisdiction. The emphasis is on the words "within the territory", and their significance is that the jurisdiction to issue writ is co-extensive with the territorial jurisdiction of the court. The reference is not to the nature and composition of the court or tribunal but to the area within which the power could be exercised.

The first respondent relied on the decision in *Clifford O'Sullivan** as authority for the position that no writ could be issued against a tribunal after it had ceased to exist. There, the facts were that the appellants had been tried by a military Court and convicted on 3rd May, 1921. They applied on 10th May, 1921 for a writ of prohibition against the officers of the Court, and that was refused on the ground that they had become *functi officio*. The respondent contended that on the same reasoning certiorari against the decision of an Election Tribunal which had become *functus officio* should be refused, and he further relied on the observations of Atkin, L.J. in Rex *Vs.* Electricity Commissioners: London Electricity Joint Committee Co. (1920) *Ex Parte*† as establishing that there was no difference in law between a writ of prohibition and a writ of certiorari. What is stated there is that both writs of prohibition and certiorari have for their object the restraining of inferior courts from exceeding their jurisdiction, and they could be issued not merely to courts but to all authorities exercising judicial or quasi-judicial functions. But there is one fundamental distinction between the two writs, and that is what is material for the present purpose. They are issued at different stages of the proceedings. When an inferior court takes up for hearing a matter over which it has no jurisdiction, the person against whom the proceedings are taken can move the superior court for a writ of prohibition, and on that, an order will issue forbidding the inferior court from continuing the proceedings. On the other hand, if the court hears that cause or matter and gives a decision, the party aggrieved would have to move the superior court for a writ of certiorari, and on that, an order will be made quashing the decision on the ground of want of jurisdiction. It might happen that in a proceeding before the inferior court a decision might have been passed, which does not

*(1921) 2 A.C. 570.
†(1924) I K.B. 171 at pages 204 and 205.

completely dispose of the matter, in which case it might be necessary to apply both for certiorari and prohibition—certiorari for quashing what had been decided, and prohibition for arresting the further continuance of the proceeding. Authorities have gone to this extent that in such cases when an application is made for a writ of prohibition and there is no prayer for certiorari, it would be open to the Court to stop further proceedings which are consequential on the decision. But if the proceedings have terminated, then it is too late to issue prohibition and certiorari for quashing is the proper remedy to resort to. Broadly speaking, and apart from the cases of the kind referred to above, a writ of prohibition will lie when the proceedings are to any extent pending and a writ of certiorari for quashing, after they have terminated in a final decision.

Now, if a writ of prohibition could be issued only if there are proceedings pending in a court, it must follow that is incapable of being granted when the court has ceased to exist, because there could be then no proceeding on which it could operate. But it is otherwise with a writ of certiorari to quash, because it is directed against a decision which has been rendered by a court or tribunal, and the continued existence of that court or tribunal is not a condition of its decision being annulled. In this context, the following passage from Juris Corpus Secundum, Volume 14, page 126 may be usefully quoted:—

> "Although similar to prohibition in that it will lie for want or excess of jurisdiction, certiorari is to be distinguished from prohibition by the fact that it.....is *directed to the cause or proceeding in the lower court* and not to the court itself, while prohibition is a preventive remedy issuing to restrain future action and is directed *to the court* itself."

The decision in *Clifford O'Sullivan** which was concerned with a writ of prohibition is, therefore, inapplicable to a writ of certiorari to quash. It has also to be noted that in that case as the military Court had pronounced its sentence before the application was filed, a writ of prohibition was bound to fail irrespective of the question whether the Tribunal was *functus officio* or not, and that is the ground on which Viscount Cave based his decision. He observed:—

> "A further difficulty is caused to the appellants by the fact that the officers constituting the so-called military Court have long since completed their investigation and reported to the commanding officer, so that nothing remains to be done by them and a writ of prohibition directed to them would be of not avail. (*See In re. Pope*† and Chabot *Vs.* Lord Morpeth‡."

In this connection, reference must be made to the decision in *R. Wormwood Scrubbs (Governor)* §. There, the applicant was condemned by a court martial sitting in Germany, and in execution of its sentence, he was imprisoned in England. He applied for a writ of *habeas corpus*, and contended that the military Court had no jurisdiction over him. The Court agreed with this contention, and held that the conviction was without jurisdiction and accordingly issued a writ of *habeas corpus*. But as he was in the custody of the Governor of the Prison under a warrant of conviction, unless the conviction itself was quashed no writ of *habeas corpus* could issue. In these circumstances, the Court issued a writ of certiorari quashing the conviction by the court martial. It is to be noted that the military Court was an *ad hoc* body, and was not in existence at the time of the writ, and the respondents to the application were the Governor and the Secretary for War. The fact that the court martial was dissolved was not considered a bar to the grant of certiorari.

Our attention has also been invited to a decision of this Court in The Lloyds Bank Ltd. *Vs.* The Lloyds Bank Indian Staff Association and others¶. In that case, following the decision in *Clifford O'Sullivan** the Calcutta High Court had refused applications for the issue of writs of certiorari and prohibition against the decision of the All India Industrial Tribunal (Bank Disputes) on the ground, amongst others, that the Tribunal had ceased to exist. In appeal to this Court against this judgment, it was contended for the appellant that on a proper construction of section 7 of the Industrial Disputes Act, the Tribunal must be deemed to be not an *ad hoc* body established for adjudication of a particular dispute but a permanent Tribunal continuing "in a sort of suspended animation"

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*(1921) 2 A.C. 570.

†5 B & Ad. 681.

‡15 Q.B. 446.

§(1948) 1 All. Eng. Rep. 438.

¶Civil Appeal No. 42 of 1952.

and "fuctioning intermittently". This Court agreeing with tne High Court rejected this contention. But the point was not argued that certiorari could issue even if the Tribunal had become *functus officio*, and no decision was given on tho question, which is now under consideration.

Looking at the substance of the matter, when once it is held that the intention of the Constitution was to vest in the High Court a power to supervise decisions of Tribunals by the issue of appropriate writs and directions, the exercise of that power cannot be defeated by technical considerations of form and procedure. In T. C. Basappa *Vs.* T. Nagappa*, this Court observed:—

> "In view of the express provisions in our Constitution we need not now look back to the early history or the procedural technicalities of these writs in English law, nor feel oppressed by any difference or change of opinion expressed in particular cases by English Judges. We can make an order or issue a writ in the nature of 'certiorari' in all appropriate cases and in appropriate manner, so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law."

I will be in consonance with these principles to held that the High Courts have power under Article 226 to issue writs of certiorari for quashing the decisions of Election Tribunals, notwithstanding that they become *functus officio* after pronouncing the decisions.

We are also of opinion that the Election Tribunals are subject to the superintendence of the High Courts under Article 227 of the Constitution, and that that superintendence is both judicial and administrative. That was held by this Court in Waryam Singh and another Vs. Amarnath and another†, where it was observed that in this respect Article 227 went further than section 224 of the Government of India Act, 1935, under which the superintendence was purely administrative, and that it restored the position under section 107 of the Government of India Act, 1915. It may also be noted that while in a certiorari under Article 226 the High Court can only annul the decision of the Tribunal, it can, under Article 227, do that, and also issue further directions in the matter. We must accordingly hold that the application of the appellant for a writ of certiorari and for other reliefs was maintainable under Articles 226 and 227 of the Constitution.

Then the question is whether there are proper grounds for the issue of certiorari in the present case. There was considerable argument before us as to the character and scope of the writ of certiorari and the conditions under which it could be issued. The question has been considered by this Court in Parry & Co. Ltd. *Vs.* Commercial Employees' Association, Madras‡, Veerappa Pillai *Vs.* Raman and Raman Ltd. and others§, Ibrahim Aboobaker *Vs.* Custodian General|| and quite recently in T. C. Basappa *Vs. T. Nagappa*¶. On these authorities, the following propositions may be taken as established: (1) Certiorari will be issued for correcting errors of jurisdiction, as when an inferior Court or Tribunal acts without jurisdiction or in excess of it, or fails to exercise it. (2) Certiorari will also be issued when the Court or Tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an opportunity to the parties to be heard, or violates the principles of natural justice. (3) The Court issuing a writ of certiorari acts in exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the Court will not review findings of fact reached by the inferior Court or Tribunal, even if they be erroneous. This is on the principle that a Court which has jurisdiction over a subject-matter has jurisdiction to decide wrong as well as right, and when the Legislature does not choose to confer a right of appeal against that decision, it would be defeating its purpose and policy, if a superior Court were to re-hear the case on the evidence, and substitute its own findings in certiorari. These

*A.I.R. 1954 S.C. 440.

†1954 S.C.R. 565.

‡1952 S.C.R. 519.

§1952 S.C.R. 583.

||1952 S.C.R. 696.

¶A.I.R. 1954 S.C. 440.

propositions are well settled and are not in dispute. (4) The further question on which there has been some controversy is whether a writ can be issued, when the decision of the inferior Court or Tribunal is erroneous in law. This question came up for consideration in Rex *Vs.* Northumberland Compensation Appeal Tribunal *Ex parte* Shaw*, and it was held that when a Tribunal made a "speaking order" and the reasons given in that order in support of the decision were bad in law, certiorari could be granted. It was pointed out by Lord Goddard, C.J. that that had always been understood to be the true scope of the powers. Walsall Overseers *Vs.* London and North Western Ry. Co.† and Rex *Vs.* Nat Bell Liquors Ltd.‡ were quoted in support of this view. In Walsall Overseers *Vs.* London and North Western Ry. Co.†, Lord Cairns, L.C. observed as follows:—

> "If there was upon the face of the order of the court of quarter sessions anything which showed that that order was erroneous, the Court of Queen's Bench might be asked to have the order brought into it, and to look at the order, and view it upon the face of it, and if the court found error upon the face of it, to put an end to its existence by quashing it."

In Rex *Vs.* Nat Bell Liquors Ltd.‡, Lord Summer said:—

> "That supervision goes to two points; one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise."

The decision in Rex *Vs.* Northumberland Compensation Appeal Tribunal *Ex parte* Shaw* was taken in appeal, and was affirmed by the Court of Appeal in Rex *Vs.* Northumberland Compensation Appeal Tribunal *Ex parte* Shaw§. In laying down that an error of law was ground for granting certiorari, the learned Judges emphasised that it must be apparent on the face of the record. Denning, L.J. who stated the power in broad and general terms observed:—

> "It will have been seen that throughout all the cases there is one governing rule: Certiorari is only available to quash a decision for error of law *if the error appears on the face of the record.*"

The position was thus summed up by Morris, L.J.:—

> "It is plain that certiorari will not issue as the cloak of an appeal in disguise. It does not lie in order to bring an order or decision for rehearing of the issue raised in the proceedings. It exists to correct error of law *where revealed on the face of an order or decision*, or irregularity, or absence of, or excess of, jurisdiction where shown."

In Veerappa Pillai *Vs.* Raman & Raman Ltd. others||, it was observed by this Court that under Article 226 the writ should be issued "in grave cases where the subordinate tribunals or bodies or officers act wholly without jurisdiction, or in excess of it, or in violation of the principles of natural justice, or refuse to exercise jurisdiction vested in them, or there is *an error apparent on the face of the record*". In T. C. Basappa *Vs.* T. Nagappa¶ the law was thus stated:—

> "An error in the decision or determination itself may also be amenable to a writ of 'certiorari' but it must be a *manifest error apparent on the face of the proceedings, e.g.*, when it is based on clear ignorance or disregard of the provisions of law. In other words, it is a patent error which can be corrected by 'certiorari' but not a mere wrong decision."

It may therefore be taken as settled that a writ of certiorari could be issued to correct an error of law. But it is essential that it should be something more than a mere error; it must be one which must be manifest on the face of the record. The real difficulty with reference to this matter, however, is not so much in the statement of the principle as in its application to the facts of a particular case. When does an error cease to be mere error, and become an error apparent on the face of the record? Learned Counsel on either side were unable to suggest any clear-cut rule by which the boundary between the two classes of errors could be demarcated. Mr. Pathak for the first respondent contended on the strength of certain observations of Chagla, C.J. in Batuk K. Vyas *Vs.* Surat

*(1951) 1 K.B. 711.
†(1879) 4 A.C. 30.
‡(1922) 2 A.C. 128.
§(1952) 1 K.B. 338.
||1952 S.C.R. 583.
¶A.I.R. 1954 S.C. 440.

Municipality* that no error could be said to be apparent on the face of the record if it was not self-evident, and if it required an examination or argument to establish it. This test might afford a satisfactory basis for decision in the majority of cases. But there must be cases in which even this test might break down, because judicial opinions also differ, and an error that might be considered by one Judge as self-evidence might not be so considered by another. The fact is that what is an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case.

These being the principles governing the grant of certiorari, we may now proceed to consider whether on the facts found, this is a fit case for a writ being issued. The Tribunal, as already stated, held by a majority that Rule 47(1)(c) was mandatory, and that accordingly the 301 ballot papers found in the box of the first respondent should have been rejected under that rule on the ground that they had not the distinguishing marks prescribed by Rule 28. It had also held under section 100(2)(c) of Act No. 43 of 1951 that the result of the election had not been materially affected by the failure of the Returning Officer to comply with Rule 47(1)(c). It accordingly dismissed the petition. Now the contention of Mr. N. C. Chatterjee for the appellant is that in reaching this conclusion the Tribunal had taken into account matters which are wholly extraneous to an enquiry under section 100(2)(c), such as the mistake of the polling officer in issuing wrong ballot papers and its possible effect on the result of the voting, and that accordingly the decision was liable to be quashed by certiorari both on the ground of error of jurisdiction and error in the construction of section 100(2)(c) apparent on the fact of the record. The first respondent, on the other hand, contended that the decision of the Tribunal that the 301 ballot papers found in his box should have been rejected under Rule 47(1)(c) was erroneous, because that rule was only directory and not mandatory and because the Election Commission had validated them, and that its decision was final. He also contended that even if the ballot papers in question were liable to be rejected under Rule 47(1)(c), for the purpose of deciding under section 100(2)(c) whether the result of the election had been materially affected the Tribunal had to ascertain the true intention of the voters; and the mistake of the polling officer under Rule 23 and its effect on the result of the election were matters which were within the scope of the enquiry under that section. The correctness of these contentions falls now to be determined.

On the question whether Rule 47(1)(c) is mandatory, the argument of Mr. Pathak is that notwithstanding that the rule provides that the Returning Officer shall reject the ballot papers, its real meaning is that he has the power to reject them, and that on that construction, his discretion in the matter of accepting them is not liable to be questioned. He relies on certain well-recognised rules of construction such as that a statute should be construed as directory if it relates to the performance of public duties, or if the conditions prescribed therein have to be performed by persons other than those on whom the right is conferred. In particular, he relied on the following statement of the law in Maxwell on Interpretation of Statutes, Xth Edition, pages 381 and 382:—

> "To hold that an Act which required an officer to prepare and deliver to another officer a list of voters on or before a certain day, under a penalty, made a list not delivered till a later day invalid, would in effect, put it in the power of the person charged with the duty of preparing it to disfranchise the electors, a conclusion too unreasonable for acceptance."

He contended that to reject the votes of the electors for the failure of the polling officer to deliver the correct ballot papers under Rule 23 would be to disfranchise them, and that a construction which involved such a consequence should not be adopted.

It is well-established that an enactment in form mandatory might in substance be directory, and that the use of the word "shall" does not conclude the matter. The question was examined at length in Julius *Vs.* Bishop of Oxford†, and various rules were laid down for determining when a statute might be construed as mandatory and when as directory. They are well-known, and there is no need to repeat them. But they are all of them only aids for ascertaining the true intention of the legislature which is the determining factor, and that must ultimately depend on the context. What we have to see is whether in Rule 47 and word "shall" could be construed as meaning "may". Rule 47(1) deals with three other categories of ballot papers, and enacts that they shall be rejected. Rule 47(1)(a) relates to a ballot paper which "bears any mark or writing by

*A.I.R. 1953 Bom. 133.

†5 A.C. 214.

which the elector can be identified". The secrecy of voting being of the essence of an election by ballot, this provision must be held to be mandatory, and the breach of it must entail rejection of the votes. That was held in Woodward *Vs.* Sarsons* on a construction of section 2 of the Ballot Act, 1872. That section had also a provision corresponding to Rule 47(1)(b), and it was held in that case that breach of that section would render the vote void. That must also be the position with reference to a vote which is hit by Rule 47(1)(b). Turning to Rule 47(1)(d), it provides that a ballot paper shall be rejected if it is spurious, or if it is so damaged or mutilated that its identity as a genuine ballot paper cannot be established. The word "shall" cannot in this sub-rule be construed as meaning "may", because there can be no question of the Returning Officer being authorised to accept a spurious or unidentifiable vote. If the word "shall" is thus to be construed in a mandatory sense in Rules 47(1)(a), (b) and (d), it would be proper to construe it in the same sense in Rule 47(1)(c) also. There is another reason which clinches the matter against the first respondent. The practical bearing of the distinction between a provision which is mandatory and one which is directory is that while the former must be strictly observed, in the case of the latter it is sufficient that it is substantially complied with. How is this rule to be worked when the Rule provides that a ballot paper shall be rejected? There can be no degrees of compliance so far as rejection is concerned, and that is conclusive to show that the provision is mandatory.

It was next contended that the Election Commission had validated the votes in question, and that in consequence the acceptance of the ballot papers by the Returning Officer under Rule 47(1)(c) was not open to challenge. It appears that interchange of ballot papers had occurred in several polling stations where election was held both for the House of the People and the State Assembly, and the Election Commission had issued directions that the rule as to the distinguishing mark which the ballot paper should bear under Rule 28 might be relaxed, if its approval was obtained before the votes were actually counted. The Returning Officer at Hoshangabad reported to the Chief Electoral Officer, Madhya Pradesh that wrong ballot papers had been issued owing to the mistake of the polling officers, and obtained the approval of the Commission for their being included, before the votes were counted. It is contended by Mr. Pathak that the power of the Election Commission to prescribe a distinguishing mark includes the power to change a mark already prescribed, and substitute a fresh one in its stead, and that when the Election Commission approved of the interchange of ballot papers at Hoshangabad, it had, in effect, approved of the distinguishing mark which those ballot papers bore, and that they were therefore rightly counted as valid by the Returning Officer.

There is no dispute that the Election Commission which has the power to prescribe a distinguishing mark for the ballot papers has also the power to change it. But the question is, was that done? The Commission did not decide in terms of Rule 28 that the ballot paper for election to the House of the People should bear a brown bar and not a green bar. The green bar continued to be the prescribed mark for the election under that rule, and the overwhelming majority of the ballot papers bore that mark. What the Commission has done is to condone the defects in a specified number of ballot papers issued in the Hoshangabad polling stations. That is not prescribing a distinguishing mark as contemplated by Rule 28, as that must relate to the election as a whole. There can be no question of there being one distinguishing mark for some of the voters and another for others with reference to the same election and at the same polling station.

There is another difficulty in the way of accepting the contention of the first respondent. The approval of the Election Commission was subsequent to the actual polling, though it was before the votes were counted. Rule 23 throws on the polling officer the duty of delivering a proper ballot paper to the voter. If a distinguishing mark had been prescribed under Rule 28, the ballot paper to be delivered must bear that mark. Therefore, if any change or alteration of the original distinguishing mark is made, it must be made before the commencement of the poll, and the ballot paper should contain the new distinguishing mark. The approval by the Election Commission subsequent to the polling, therefore, cannot render valid the 301 ballot papers which did not bear the distinguishing mark prescribed for the election, and they are liable to be rejected under Rule 47(1)(c). The conclusion of the majority of the Tribunal that in accepting the ballot papers in question the Returning Officer had contravened that rule must therefore be accepted.

*L.R. 10 Common Pleas 733.

It remains to deal with the contention of the appellant that the decision of the Election Tribunal under section 100(2)(c) that the result of the election had not been materially affected is bad, as it is based on considerations extraneous to that section. This opens up the question as to the scope of an enquiry under section 100(2)(c). That section requires that before an order setting aside an election could be made, two conditions must be satisfied: It must firstly be shown that there had been improper reception or refusal of a vote or reception of any vote which is void, or non-compliance with the provisions of the Constitution or of the Act (No. 43 of 1951) or any rules or orders made under that Act or of any other Act or rules relating to the election or any mistake in the use of the prescribed form. It must further be shown that as a consequence thereof the result of the election had been materially affected. The two conditions are cumulative, and must both be established, and the burden of establishing them is on the person who seeks to have the election set aside. That was held by this Court in Vashist Narain Vs. Dev Chandra*. The Tribunal has held in favour of the appellant that Rule 47(1)(c) is mandatory, and that accordingly in accepting the 301 ballot papers which had not the requisite distinguishing marks the Returning Officer had contravened that rule. So, the first condition has been satisfied. Then there remains the second, and the question is whether the appellant has established that the result of the election had been materially affected by contravention of Rule 47(1)(c). The contention of Mr. Chatterjee is that when once he has established that the Returning Officer had contravened Rule 47(1)(c), he has also establlshed that the result of the election had been materially affected, because the marginal difference between the appellant and the first respondent was only 174 votes, and that if the ballot papers wrongly counted under Rule 47(1)(c) had been excluded and the valid votes alone counted, it was he and not the first respondent that should have been declared elected under Rule 48, and that the result of the election had thus been materially affected.

In reply, Mr. Pathak contends that this argument, though it might have proved decisive if no other factor had intervened, could not prevail in view of the other facts found in this case. He argued that Rule 47 was not the only rule that had been broken; that owing to the mistake of the polling officer wrong ballot papers had been issued, and thus Rule 23 had been broken; that the printing of the distinguishing mark was faint and that Rule 28 had not also been properly complied with; that there was thus a chain of breaches all linked together, the final phase of it being the breach of Rule 47(1)(c) and the effective cause thereof being the violation of Rule 23, and that in judging whether the result of the election had been affected, these were matters relevant to be taken into consideration. The object of the election, he contended, was to enable the majority of the voters to send a representative of their choice and for that purpose it was necessary to ascertain the intention of the voters from the ballot papers, irrespective of the question whether they were formally defective or not; that it was accordingly open to the Tribunal to look behind the barriers created by Rules 23, 28 and 47(1)(c), discover the mind of the voters, and if that was truly reflected in the result of the election as declared under Rule 48, dismiss the petition under section 100(2)(c).

Mr. Chatterjee disputes this position, and contends that the enquiry under that section must be limited to the matters raised in the election petition, and that as there was no complaint about the breach of Rule 23 in that petition, it was outside the scope of the enquiry. It is unnecessary to consider whether it was open to the Tribunal to enquire into matters other than those set out in the petition, when the returned candidate merely seeks to support the declaration. He has in this case presented a recrimination petition under section 97 raising the question of breach of Rule 23, and that is therefore a matter which has to be determined. The Tribunal has gone into that question, and has held that there was a violation of that rule, and its conclusion is not open to attack in these proceedings, and has not, in fact, been challenged. The real controversy is as to the effect of that finding on the rights of the parties. The answer to this is to be found in section 97. Under that section, all matters which could be put forward as grounds for setting aside the election of the petitioner if he had been returned under Rule 48 could be urged in answer to the prayer in his petition that he might be declared duly elected. And the result of this undoubtedly is that the first respondent could show that if the appellant had been returned under Rule 48 his election would have been liable to be set aside for breach of Rule 23, and that therefore he should not be declared elected. That according to the Tribunal having been shown, it is open to us to hold that by reason of the violation of Rule 23, the appellant is not entitled to be declared elected.

*A.I.R. 1954 S.C. 513.

Can we go further, and uphold the election of the first respondent under section 100(2)(c) on the ground that if Rule 23 had not been broken, the wasted votes would have gone to him? The argument of the appellant is that that would, in effect, be accepting the very votes which the Legislature says in Rule 47(1) should be rejected, and that it is not warranted by the scheme of the Act. We think that this contention is well-founded. Section 46 of the Act provides that "when the counting of the votes has been completed, the Returning Officer shall forthwith declare the result of the election in the manner provided by this Act or the rules made thereunder". The rule contemplated by this section is Rule 48. That provides that the Returning Officer should after counting the votes "forthwith declare the candidate or candidates to whom the largest number of *valid* votes has been given, to be elected". Under this rule quite clearly no candidate can be declared elected on the strength of votes which are liable to be rejected under Rule 47. The expression "the result of the election" in section 100(1)(c) must, unless there is something in the context compelling a different interpretation, be construed in the same sense as in section 66, and there it clearly means the result on the basis of the valid votes.

This conclusion is further fortified when the nature of the duties which a Returning Officer has to perform under Rule 47 is examined. Under that Rule, the Returning Officer has to automatically reject certain classes of votes for not being in conformity with the rules. They are set out under Rules 47(1)(b) and (c). In other cases, the rejection will depend on his decision whether the conditions for their acceptance have been satisfied. Thus in Rule 47(1)(a) he must decide whether the mark or writing is one from which the elector could be identified; under Rule 47 (1) (d), whether the ballot paper is spurious or mutilated beyond identification; and under Rule 47(2), whether more than one ballot paper has been cast by the voter. Rule 47(4) is important. It provides that "the decision of the Returning Officer as to the validity of a ballot paper..... shall be final subject to any decision to the contrary given by a Tribunal on the trial of an election petition calling in question the election". Under this provision, the Tribunal is constituted a Court of Appeal against the decision of the Returning Officer, and as such its jurisdiction must be co-extensive with that of the Returning Officer and cannot extend further. If the Returning Officer had no power under Rule 47 to accept a vote which had not distinguishing mark prescribed by Rule 28 on the ground that it was due to the mistake of the presiding officer in delivering the wrong ballot paper—it is not contended that he has any such power, and clearly he has not—the Tribunal reviewing this decision under Rule 47(4) can have no such power. It cannot accept a ballot paper which the Returning Officer was bound to reject under Rule 47.

It is argued with great insistence that as the object of the Election Rules is to discover the intention of the majority of the voters in the choice of a representative, if an elector has shown a clear intention to vote for a particular candidate, that must be taken into account under section 100(2)(c), even though the vote might be bad for non-compliance with the formalities. But when the law prescribes that the intention should be expressed in a particular manner, it can be taken into account only if it is so expressed. An intention not duly expressed is, in a Court of Law, in the same position as an intention not expressed at all.

The decision in Woodward *Vs.* Sarsons* was cited in support of the contention that for deciding whether the result of the election had been affected it was permissible to take into account votes which had been rendered invalid by the mistake of the polling officer. That was a decision on section 13 of the Ballot Act, 1872 which provided that no election should be declared invalid by reason of non-compliance with the rules, if it appeared to the Tribunal "that the election was conducted in accordance with the principles laid down in the body of this Act, and that such non-compliance or mistake did not affect the result of the election". What happened in that case was that all the ballot papers issued at polling station No. 130 had been marked by the polling officer and had become invalid under section 2 of the Act. It was contended on behalf of the unsuccessful candidate that the mistake of the polling officer rendered the whole election void, without reference to the question whether the result of the election had been affected. In repelling this contention, the Court observed at page 750:—

> "Inasmuch, therefore, as no voter was prevented from voting, it follows that the errors of the presiding officers at the polling stations No. 130 and No. 125 did not affect the result of the election, and did not prevent the majority of electors from effectively exercising their votes in favour of the candidate they preferred, and therefore that the election cannot be declared, void by the common law applicable to parliamentary elections."

*L.R. 10 Common Pleas. 733.

This was merely a decision on the facts that the departure from the prescribed rules of election at the polling stations was not so fundamental as to render the election not one "conducted in accordance with the principles laid down under the body of this Act".

Reliance was placed on certain observations in *Re. South Newington Election Petition**. In that case, the ballot paper had been rejected by the Returning Officer on the ground that it did not bear the requisite official mark. The Court in a petition to set aside the election held on an examination of the ballot paper that the official stamp had been applied, though imperfectly, and that it should have been accepted. The actual decision is in itself of no assistance to the respondent; but the Court observed in the course of its judgment:—

> "We think that, in a case where the voter is in no sense to blame, where he has intended to vote and has expressed his intention of voting in a particular way, and, so far as his part of the transaction is concerned, has done everything that he should, and the only defect raised as a matter of criticism of the ballot paper is some defect on the part of the official machinery by which the election is conducted, special consideration should (and, no doubt, would) be given, in order that the voter should not be disfranchised."

These observations are no authority for the proposition that if there was no mark at all on the ballot paper it could still be accepted on the ground of intention. On the other hand, the whole of the discussion is intelligible only on the hypothesis that if there was no mark at all on the ballot paper, it must be rejected.

In the result, we must hold that in maintaining the election of the first respondent on the basis of the 301 votes which were liable to be rejected under Rule 47(1)(c) the Tribunal was plainly in error. Mr. Chatterjee would have it that this error is one of jurisdiction. We are unable to take this view, because the Tribunal had jurisdiction to decide whether on a construction of section 100(2)(c) it could go into the fact of breach of Rule 23, and if it committed an error, it was an error in the exercise of its jurisdiction and not in the assumption thereof. But the error is manifest on the face of the record, and calls for interference in certiorari.

We have held that the election of the first respondent should be set aside. We have further held that if the Returning Officer had, after rejecting the 301 ballot papers which did not bear the correct marks, declared the appellant elected, his election also would have to be declared void. The combined effect of section 97 and section 100(2)(c) is that there is no valid election. Under the circumstances, the proper order to pass is to quash the decision of the Tribunal and remove it out of the way be certiorari under Article 226, and to set aside the election of the first respondent in exercise of the powers conferred by Article 227. As a result of our decision, the Election Commission will now proceed to hold a fresh election.

This appeal must accordingly be allowed, the decisions of the High Court and the Tribunal quashed and the whole election set aside. The parties will bear their own costs throughout.

(Sd.) MEHR CHAND MAHAJAN, C.J.

(Sd.) BIJAN KUMAR MUKHERJEE, J.

(Sd.) SUDHI RANJAN DAS, J.

(Sd.) VIVIAN BOSE, J.

(Sd.) N. H. BHAGWATI, J.

(Sd.) B. JAGANNADHADAS, J.

(Sd.) T. L. VENKATARAMA AYYER, J.

Dated 9th December, 1954.

*(1948) 2 A.II. Eng. Reports 509.

APPENDIX I

IN THE HIGH COURT OF JUDICATURE AT NAGPUR.

MISCELLANEOUS PETITION No. 174 OF 1953.

Hari Vishnu Kamath son of Rama Kamath, resident of Dhantoli, Nagpur Tah. and District Nagpur—*Petitioner.*

Versus

1. Syed Ahmad Syed Isak, Advocate of Hoshangabad, Tah. and District Hoshangabad.
2. Sukumar Shyamrao Pagare, formerly of Friends Rural Centre, Rasulia, now near Railway Station, Hoshangabad, Tah. and District Hoshangabad.
3. Raghunath Prasad Kaluram Parsad of Sohagpur Tah. Sohagpur, district Hoshangabad.
4. Harnarayansingh Pyarelal Katakwar of mouza Sirpan, post Khaparkheda, tahsil Sohagpur, district Hoshangabad.
5. Raghubir Prasad Nandkishore Gour, pleader Hoshangabad Tah. and District Hoshangabad.
6. Shri B. K. Puranik, B.A. LL.B., District and Sessions Judge, Hoshangabad (Chairman of the Election Tribunal Hoshangabad).
7. Shri S. M. Ahmad, B.A., LL.B., retired District and Sessions Judge, (Member of the Election Tribunal, Hoshangabad) residing at Nagpur.
8. Shri B. Chatterji, M.A., LL.B., Hoshangabad, (Member of the Election Tribunal, Hoshangabad)—*Respondents.*

An application for issue of a writ in the nature of Certiorari under articles 226 and 227 of the Constitution (1) for quashing the order of the Election Tribunal, Hoshangabad dismissing the petitioner's petition for setting aside the election of the respondent No. 1 and (2) for a declaration to the effect that the respondent No. 1 was not duly elected and that the petitioner has been duly elected to the seat.

The 4th Day of November 1953.

PRESENT

The Honourable Shri B. P. Sinha, C. J., The Honourable Shri J. R. Mudholkar, and The Honourable Shri G. P. Bhutt, JJ.

ORDER

PER SINHA C. J. This Application under articles 226 and 227 of the Constitution impugns the order of the Election Tribunal (respondents 6 to 8) constituted to determine the election petition filed by the petitioner challenging the declaration by the returning officer that the first respondent had been duly elected to the House of the People from the Hoshangabad Parliamentary constituency in the State of Madhya Pradesh. Respondents 2 to 5, besides the petitioner were the other candidates who had been duly nominated for the same seat. Of them, respondents 4 and 5 had withdrawn their candidature. The votes polled by the petitioner and the first three respondents who actually contested the election were declared to have been as under:

(1) Petitioner, 65201.

(2) First respondent, 65375.

(3) Second respondent, 20653.

(4) Third respondent, 13609.

2. The petition averred that in the ballot boxes used at Sobhapur polling stations, ballot papers bearing marks different from those prescribed for use at those polling stations were found, that they should have been rejected in view of the provisions of rule 47 prescribed under the Representation of the People Act, 1951, and that these votes were illegally counted as valid votes by the returning officer with the result that the first respondent was declared to have secured the largest number of valid votes whereas if the rule aforesaid had been properly applied and the votes aforesaid rejected the petitioner would

have been declared to have secured the largest number of valid votes. Other irregularities were also alleged by the petitioner, but the petition has been mainly founded on the irregularity or illegality aforesaid.

3. In view of the allegations aforesaid the petitioner contended that the declaration of respondent No. 1 as having been duly elected was illegal and void; that the result of the election was materially affected by the illegality committed by the returning officer in counting those invalid votes polled at the Sobhapur polling stations; and finally that on a proper and legal counting of the votes in accordance with the prescribed rules the petitioner was entitled to be declared to have been duly elected to the seat in question.

4. The Tribunal by a majority of 2 to 1 held that the provisions of rule 47 (1) (c) of the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1951 were mandatory and not merely directory and that therefore the votes found in the boxes at the polling stations at Sobhapur were invalid votes which should not have been taken into account in determining the majority of valid votes. But the Tribunal held that the result of the election had not been materially affected by the illegality complained of. This decision of the Tribunal has been questioned by the petitioner as illegal and without jurisdiction. The petitioner has gone to the length of contending that the Tribunal could not have come to any other conclusion under the law than that the petitioner had been duly elected and that the election of Respondent No. 1 was void. The petition prayed (1) that a writ in the nature of a certiorari be issued to quash the order of the Election Tribunal, and (2) that the election of the first respondent be declared void and in that seat the petitioner be declared to have been duly elected.

5. Preliminary objections were taken on behalf of the first respondent to the hearing of the application on the grounds that the application was misconceived, that no writ of the nature prayed for by the petitioner could be issued against the respondents that this Court could not recall the notification of the order of the Election Tribunal issued by the Election Commission of India, in the absence of the Election Commission, and finally that this Court had no jurisdiction under articles 226 and 227 of the Constitution to go into the matter of election petitions.

6. On merits also the first respondent contested the position taken by the petitioner in his election petition and in this Court with respect to the conclusions of the Election Tribunal and its powers. It was denied that the Election Tribunal had proceeded on a wrong view of the law or that it had assumed jurisdiction which it did not possess or that there was any error of law apparent on the face of the record, or that there had been any miscarriage of justice.

7. Though in terms the petition prays for a writ of certiorari quashing the order of the Election Tribunal and for a declaration that the election of the first respondent be declared void and that in that seat the petitioner should be declared to have been duly elected, the learned counsel for the petitioner contended that his position was that the Election Commission had gone beyond its jurisdiction in coming to the conclusion that the election had not been materially affected by the irregularity in counting votes which in law had been found to be invalid. The contention on behalf of the petitioner was not that the Election Tribunal had not the jurisdiction to go into the merits of the controversy between the parties, but that it had gone beyond its jurisdiction in dealing with the question whether the result of the election had been materially affected by the irregularity or the illegality committed by the returning officer in counting such votes as have been found to be invalid in view of the prescribed rules.

8. The learned counsel on behalf of the first respondent, who only was represented before us, contended that in view of the provisions of article 329(b) of the Constitution this Court could not go into the merits of the decision arrived at by the Election Tribunal. It was further argued that even assuming that this Court had the jurisdiction to examine the conclusions arrived at by the Election Tribunal it should be held that the Election Tribunal had not gone beyond its jurisdiction in arriving at its conclusions. A good deal of argument was directed on both sides to the question whether rule 47 was mandatory or only directory.

9. It is manifest that this Court has first to determine whether it has any jurisdiction under articles 226 and 227 or under either of them to go into the merits of the decision arrived at by the Election Tribunal or whether it can go into the question of the extent of the jurisdiction of the Election Tribunal if it is found that the jurisdiction of this Court is barred by article 329(b) of the Constitution to go into the question raised by the election petition before the Election

Tribunal. It is therefore necessary to decide at the very outset whether this Court has the jurisdiction to entertain this petition either under article 226 or article 227 of the Constitution and examine for itself the conclusions arrived at by the Election Tribunal or even the question of the extent of the jurisdiction of the Election Tribunal; and if so, whether the Election Tribunal had in coming to any of its conclusions usurped a jurisdiction not vested in it by law.

10. The relevant portions of article 329 are in these words:

'Notwithstanding anything in this Constitution—

(b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature.'

In order to determine the exact scope of these provisions we have to examine the scheme of the Constitution in relation to election matters. Part XV deals with elections. Article 324 vests in the Election Commission the superintendence, direction and control of elections to Parliament and to the Legislature of every State. It also vests in the Election Commission the superintendence, direction and control of the preparation of the electoral rolls, and the appointment of Election Tribunals for the decision of doubts and disputes arising out of or in connexion with such elections. Article 327 contemplates that Parliament shall have power to legislate with respect to all matters relating to or in connexion with election to either House of Parliament or to the State Legislatures as also to make by law provision for the preparation of electoral rolls, the delimitation of constituencies, and other connected matters. Similar power is contemplated by Article 328 for the Legislature of a State in so far as Parliament has not made provision with respect to elections to the Legislature of a State, including the preparation of electoral rolls and other allied matters. It is in pursuance of the power contained in article 327 that Parliament has enacted the Representation of the People Act, 1950 (43 of 1950) providing for the allocation of seats and delimitation of constituencies in the House of the People and the Legislatures of the States, the qualification of voters and the preparation of electoral rolls, and has enacted the Representation of the People Act, 1951 (43 of 1951) to provide for the conduct of elections to Parliament and to the Legislatures of States, the qualifications and disqualifications for membership, and the decision of doubts and disputes arising out of or in connexion with such elections. Article 329 of the Constitution has provided that such of the provisions of the two Acts aforesaid as are specified in article 329, clauses (a) and (b), shall not be questioned in any court.

11. Article 329 starts with the *non-obstante* clause 'Notwithstanding anything in this Constitution'. A good deal of argument was directed to the scope of the application of this clause. On behalf of the petitioner it was contended with reference to the provisions of clause (b) of article 329 that what has been excluded from the jurisdiction of the Courts is the matter of elections and not the decision of the Election Tribunal. On behalf of the first respondent, on the other hand, it has been contended that the matter of election to Parliament and to the Legislature of a State has been entirely placed beyond challenge in any Court of law, and it has further been added that 'election' in article 329(b) has been used in its widest significance, that is to say, election ending up with the final declaration of the return of a member to either House of Parliament or to the Legislature of a State, so that even the result depending upon the decision of the Election Tribunal is also within the meaning of clause (b) of article 329.

12. The following observations of their Lordships of the Supreme Court in N. P. Ponnuswami *vs.* Returning Officer, Namakhal Constituency and others [(1952) S. C. R. 218 at pp. 226-227] may be usefully reproduced here.

'As we have seen, the most important question for determination is the meaning to be given to the word "election" in article 329(b). That word had by long usage in connection with the process of selection of proper representative in democratic institutions, acquired both a wide and a narrow meaning. In the narrow sense, it is used to mean the final selection of a candidate which may embrace the result of the poll when there is polling or a particular candidate being returned unopposed when there is no poll. In the wide sense the word is used to connote the entire process culminating in a candidate being declared elected. In Srinivasalu v. Kuppuswami (A.I.R. 1928 Mad. 253) at p. 255, the learned Judges of the Madras Hight Court after examining the question, expressed the opinion that the term "election" may be taken to embrace the whole procedure whereby an "elected member" is returned, whether or not it be found necessary to take a poll. With

this view, my brother, Mahajan J. expressed his agreement in Sat Narain v. Hanuman Prasad (A.I.R. 1945 Lah. 85); and I also find myself in agreement with it. It seems to me that the word "election" has been used in Part XV of the Constitution in the wide sense, that is to say, to connote the entire procedure to be gone through to return a candidate to the legislature. The use of the expression "conduct of elections" in article 324 specifically points to the wide meaning, and that meaning can also be read consistently into the other provisions which occur in Part XV including article 329(b).'

13. It is equally clear from the observations of their Lordships at page 232 in the case cited above that the jurisdiction of the High Court to issue writs under article 226 of the Constitution is barred by the express words of the *non obstante* clause in article 329(b) of the Constitution. Their Lordships made the following observations in this connexion:

'It will be noticed that the language used in that article and in section 80 of the Act is almost identical, with this difference only that the article is preceded by the words "notwithstanding anything in this Constitution". I think that these words are quite apt to exclude the jurisdictions of the High Court to deal with any matter which may arise while the elections are in progress.'

14. As already observed, the Representation of the People Act, 1951 has been enacted by the Indian Parliament by virtue of the power conferred upon it by article 327 of the Constitution. Section 80 of that act is in these terms:

'No election shall be called in question except by an election petition presented in accordance with the provisions of this Part.' (that is to say Part VI of the Act dealing with 'Disputes regarding Elections').

The provisions of that Part of the Act will have to be adverted to in some detail presently. But it is clear that the provisions of section 80 of the Act and the other provisions of that Part have to be read along with article 329(b) of the Constitution and only then their full import can be appreciated.

15. It has further been observed by their Lordships of the Supreme Court in Ponnuswami's case that Part XV of the Constitution, in which article 329 is the culminating provision, is really a Code in itself which envisage a complete body of rules making provision for the conduct of elections and the setting up of the only machinery for holding elections and for enquiring into and deciding disputes relating to or arising out of such elections.

16. Thus, on reading the provisions of article 329(b) of the Constitution with section 80 of the Representation of the People Act there is no manner of doubt that only one challenge to the result of an election is contemplated by the Constitution, and that challenge is by an election petition. Once an election petition has been filed and has been determined by the Election Tribunal as set up by the Act of 1951 the remedy to persons interested in questioning the result of elections is exhausted and the door completely barred against any further questioning of the result of an election.

17. The same matter may be put in another form by saying that the Constitution and the Indian Parliament when enacting the Representation of the People Act, 1951 intended that there should be no conflict of decision on the question of disputed elections between the determination made by an Election Tribunal and that made by any other court, including the High Courts in India. Otherwise, as it has happened in the instant case, the Election Tribunal has rightly or wrongly come to the conclusion that the first respondent has been validly elected and that any illegalities or irregularities committed by the Returning Officer in the counting of votes and in declaring the result of the election having not materially affected the result of the election. On the other hand, before us the petitioner's counsel have vehemently attacked the decision of the Election Tribunal on the main question whether Respondent No. 1 had been rightly declared elected. They went to the length of contending that there was no other decision open to the Election Tribunal than that the petitioner should be declared to have been duly elected. If this Court were to accept that contention, clearly there would be a conflict of decisions between this Court and the Election Tribunal. This would lead to the very same anomally that the Constitution and the Indian Parliament in clear terms intended to avoid.

18. The matter may be looked at from yet another point of view. It cannot be contended that the petitioner or any citizen of India in the position of the petitioner had any rights at the common law to be declared elected

to the Union or the State Legislatures. Such a right of seeking election and sitting in Parliament or in a State Legislature is a creature of the Constitution. That very Constitution has provided a special remedy for enforcing that right. It is clear therefore that it is only that remedy and no other which is available to a person who challenges an election. Reference may be made to the observations of their Lordships of the Supreme Court at page 231 and 232 of the report quoted above, where their Lordships have made reference to the leading decision in Wolvernampton New Water Works Co. *vs.* Hawkesford [6 C.B. (N.S.) 336], followed with approval by the House of Lords in Neville *vs.* London Express Limited [(1919) A.C. 368], and by the Judicial Committee in Attorney-General Trinidad and Tobago v. Gordon Grant and Co. [(1935) A. C. 532], and Secretary of State v. Mask and Co. (44 C.W. No. 709).

19. Reading the whole article 329 it becomes clear that the jurisdiction of all courts has been barred in respect of all laws relating to the delimitation of constitutions and allotment of seats to such constituencies, as also to election matters in respect of the Union Legislature and the State Legislatures, so that not only matters immediately concerned with election, used in its widest sense, but also matters of allotment of constituencies and delimitation thereof, which come much earlier than elections, have been placed beyond question in the ordinary Courts. The Constitution has therefore expressed in no uncertain terms its intention of treating these matters as wholly distinct and separate from ordinary civil rights which can form the subject matter of adjudication in the civil courts of the land. In other words, clauses (a) and (b) of article 329 of the Constitution must be read as supplementary and complementary to each other and thus exhausting the whole field of demarcating the constituencies and erecting a machinery for holding the elections, and lastly providing for a special tribunal of exclusive jurisdiction to adjudicate upon disputes relating to and arising from elections. Hence the two Acts, viz. the Representation of the People Act, 1950 and the Representation of the People Act, 1951 between them exhaust the entire field relating to all the aforesaid matters.

20. Those Acts have been enacted by the Indian Parliament by virtue of the power conferred upon it by articles 327 and 328 of the Constitution. It has been argued that those articles do not begin with non obstante clause with which article 329 begins but that they are 'subject to the provisions of this Constitution'. These words must be read with reference to the context as meaning the other provisions of the Constitution bearing upon those matters; for example, the provisions in articles 324, 325, and 326 contained in this very Part XV of the Constitution; that is to say, it is not open to the Parliament to enact laws relating to elections which would make a discrimination on grounds of religion, race, caste, sex or any of them; nor should any such law infringe the fundamental rule that the elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult sufferage and other provisions in the Constitution which have declared the fundamental rights of the citizens of India. But the words 'subject to the provisions of this Constitution' do not necessarily import the right of the citizen to have recourse to articles 226 and 227 of the Constitution to challenge matters covered by the Legislative enactments aforesaid. When the Constitution itself has clearly indicated its intention by laying down that matters relating to elections shall be out of reach of litigation in the ordinary Courts of the land and has authorised Parliament to enact detailed rules bearing on that subject, the inference, in my opinion, is clear that articles like 226 and 227 of the Constitution conferring as they do very wide powers of interference by the High Court should be out of the way so far as electoral matters are concerned. I would, therefore, agree with the Division Bench of this Court in the case of Ramkrishna *vs.* Thakur Daoosingh (1953 N.L.J. Nag. 458) in holding that this Court has no jurisdiction to entertain a petition to quash the decision of an Election Tribunal.

21. It was contended on behalf of the petitioner that though the petition may comprise reliefs which have the effect of setting aside respondent No. 1's election and of granting a declaration in favour of the petitioner that he should be deemed to have been duly elected, and even assuming that those reliefs are not available to the petitioner in view of article 329(b) of the Constitution, the petitioner is still entitled to question the decision of the Election Tribunal and to ask this Court to quash that decision. In my opinion, this argument amounts to asking the Court to do indirectly what it cannot do directly. In this connexion the following observations of their Lordships of the Judicial Committee of the Privy Council in Raleigh Investment Co. Ltd., *vs.* Governor General in Council (74 I.A. 50 at p. 62) are apposite, bearing both on the question of the reliefs sought in this case, and on the question of the jurisdiction of the Election Tribunal holding that the result of the election has not been materially affected by the irregularity or illegality in counting the votes complained of:

'In form the relief claimed does not profess to modify or set aside the assessment. In substance it does, for repayment of part of the sum due by virtue of the notice of demand could not be ordered so long as the assessment stood. Further, the claim for the declaration cannot be rationally regarded as having any relevance except as leading up to the claim for repayment and the claim for an injunction is merely berbiage. The clound of words fails to obscure the point of the suit. An assessment made under the machinery provided by the act, if based on a provision subsequently held to be ultra vires is not a nullity like an order of a court lacking jurisdiction. Reliance on such a provision is not an excess of jurisdiction but a mistake of law made in the course of its exercise. Their Lordships therefore regard the suit as in truth directed exclusively to a modification of the assessment.'

22. In that case a suit had been instituted by the appellant questioning the jurisdiction of income-tax authorities on the ground that certain provisions of the Act were ultra vires the Indian Legislature. Section 67 of the Indian Income-tax Act barred the jurisdiction of the Courts to go into the merits of the assessment made under the Act. In those circumstances their Lordships held that the suit, though not in form one to modify or set aside an assessment but only for a declaration, was in substance one meant for the same relief. If we accept the contention of the petitioner in this case and quash the orders passed by the Election Tribunal the necessary result of such a quashing would be that the election which has been finally declared by the Election Tribunal to have been valid would again be thrown into the melting pot. That will amount to permitting a second challenge to the result of the election, which, as already indicated, was not intended by the Constitution.

23. It is true that their Lordships of the Supreme Court in *Ponnuswami's case* have reserved their opinion as to the powers of the High Court under article 226 of the Constitution to deal with the decision of an Election Tribunal as it was not necessary to express any opinion on that aspect of the matter. But the judgment of the Supreme Court read as a whole is more consistent with the view that judicial interference with the decisions of Election Tribunals, which have been declared to be final by the Representation of the People Act, 1951, is barred, than with the contrary view. It has however been argued that though the power of this Court to review the decision of the Election Tribunal on its merits may have been barred, that jurisdiction still remains where this Court finds that the Election Tribunal has usurped a jurisdiction which it did not possess or that it has failed to exercise a jurisdiction vested in it by law. Assuming that it is so, there are practical difficulties in giving effect to that contention. An Election Tribunal is not a permanent tribunal but is constituted by the Election Commission *ad hoc* An Election Tribunal is constituted to deal with particular election petitions, and as soon as those have been dealt with and determined by the Election Tribunal it ceases to exist. In the instant case it is common ground that the Election Tribunal as such has ceased to exist, though the persons constituting that Tribunal may still be in existence. If the Tribunal has ceased to exist, as is the case, how can any *writ* be issued to such a tribunal? Realizing that difficulty the learned counsel for the petitioner urged that this Court acting under its powers of superintendence under article 227 of the Constitution may still judicially review or revise the decision of the tribunal which has ceased to exist. In my opinion, the difficulties which stand in the way of the petitioner in invoking the aid of article 226 of the Constitution are there even in respect of the powers of this Court under article 227 of the Constitution. If this Court cannot quash an order of a tribunal which has ceased to exist it should equally be true of its powers, whatever they are, under article 227 also. It has been said with reference to this article that though the tribunal may have ceased to exist the order is there still in existence. If this High Court can exercise jurisdiction in respect of the decision of the Tribunal under article 227 of the Constitution, it should equally be open to this Court to exercise its powers under article 226, in so far as the question of quashing the decision is concerned.

24. In my opinion, there are more serious difficulties in the way of the petitioner praying in his aid the provisions of article 227. The first question that arises in connexion with the provisions of this article *vis-a-vis* the decision of the Election Tribunal is whether the Election Tribunal is such a tribunal as could come within the purview of article 227. Under article 324 of the Constitution the appointment of election tribunals like the one we are dealing with in this case is vested in the Election Commission to be appointed by the President. The Constitution envisages the Election Commission to be an independent of all other organs in the State . The Constitution does not contemplate the subordination of the Election

Commission to the Executive or the Judiciary. The appointment and removal of the Chief Election Commissioner is placed by the Constitution on the same footing as that of a Judge of the Supreme Court. The Election Commission has to function under the directions of the Chief Election Commissioner. The Election Commission consisting of the Chief Election Commissioner and such other Election Commissioners as the President may appoint, is vested with the superintendence, direction and control of all matters relating to elections including the appointment of election tribunals. Part XV of the Constitution, as already indicated, along with the Representation of the People Act, 1950 and the Representation of the People Act, 1951 is a complete Code in itself in electoral matters. Under section 85 of the Representation of the People Act, 1951, the Election Commission has been vested with the power of dismissal of an election petition which does not comply with the terms of section 81, section 83, or section 117 of the Act. The law does not contemplate any appeal from such an order of dismissal, and it is only when the Election Commission has not exercised the power under that section that the Act envisages the appointment of an election tribunal for the trial of that election petition. Section 105 of the Act declares the order of the Tribunal under the Act to be final and conclusive. The Act does not make any provision for an appeal or revision or review of the order passed by the Election Commission under section 85, apparently because that body is intended to be supreme within its own province. No authority higher than that of the Election Commission in election matters has been contemplated by Constitution.

25. It is also noteworthy that though the Election Commission has the power to appoint an election tribunal it has not been vested with revisional or appelate powers over the decision of such a tribunal, which under section 105 of the Act has been declared to be final and conclusive. There is no provision similar to section 105 of the Act with reference to an order of the Election Commission dismissing an election petition under section 85 of the Act. Such an order of the Election Commission is treated as of an administratve character and final. An election petition assumes a judicial or quasi-judicial character only after it has been passed by the Commission, and is then dealt with by an Election Tribunal. That is an indication of the intention of Parliament that the Election Commission and an election tribunal shall be the ultimate authority within its own jurisdiction.

26. Neither Part XV nor the Representation of the People Act, 1951 contemplate judicial or administrative subordination of the Election Commission or of an Election Tribunal to the High Court. Hence, the inference is permissible that the Constitution did not intend to make article 227 applicable to an election tribunal, assuming that article 227 was intended by the Constitution to vest every High Court with powers of judicial control.

27. Clause (2) of article 227 of the Constitution gives an indication as to the kind of superintendence the High Court is expected to exercise over inferior Courts and tribunals. Can it be said of the High Court that it can call for returns from or issue general rules and prescribe forms for regulating the practice and proceedings of election tribunals or such other matters as are described in that clause? I think not. If clause (2) of article 227 is not applicable to an election tribunal, in my opinion clause (1) of that article is equally out of the way of such a tribunal.

28. In this connexion the observations of the majority of the Full Bench in Sheoshankar *vs.* M. P. State Government (A.I.R. 1951 Nag. 58 F. B.), was brought to our notice, but with all respect to the learned judges who made those observations. I am inclined to take the view that article 227 of the Constitution was not intended to vest the High Courts with powers of judicial interference in contradiction to administrative control. Such an administrative control can be exercised by the High Court only in relation to inferior tribunals. In my opinion, the Constitution does not contemplate an election tribunal to be of such a character as to come within the purview of article 227 of the Constitution.

29. In my opinion, the position of an election tribunal *vis-a-vis* the High Court is that of a Superior Tribunal of exclusive jurisdiction to another Superior Court. The observations of their Lordships in The Queen *vs.* The Judges and Justices of the Central Criminal Court [(1833) 11 Q.B.D. 479], were approved by the Judicial Committee in Goonasinha *vs.* De Kretser (A.I.R. 1945 P.C. 83 at p. 84) in these terms:

> 'It is well settled, and counsel did not seek to argue to the contrary, that a court having jurisdiction to issue a writ of certiorari will not and cannot issue it to bring up an order made by a Judge of that Court. Nor will a Superior Court issue the writ directed to another Superior Court (1883) 11 Q.B.D.479—and if the Election Judge is to be regarded as a special or independent tribunal his Court would, in their Lordship's opinion, be a Superior Court.'

30. In the leading case of *Theberge* v. *Laudry* (2 A.C. 102), the Judicial Committee refused to grant special leave to appeal from the decision of the Election Court, which was held to be a special court with exclusive jurisdiction. After examining the provisions of the Act of Parliament called the Quebec Controverted Elections Act of the year 1875, the Lord, Chancellor delivering the opinion of the Judicial Committee made the following observations:

> 'Now, the subject matter, as has been said of the legislation is extremely peculiar. It concerns the rights and the privileges of the electors and of the Legislative Assembly to which they elect members. Those rights and privileges have always in every colony, following the example of mother country, been jealously maintained and guarded by the Legislative Assembly. Above all, they have been looked upon as and privileges which pertain to the Legislative Assembly in complete independence of the Crown, so far as they properly exist. And it would be a result somewhat surprising; and hardly in consonence with the general scheme of the legislation if with regard to rights—and privileges of this kind, it were to be found that in the last resort the determination of them no longer belonged to the Legislative Assembly, no longer belonged to the superior Court which the Legislative Assembly had put in its place,.....'

31. The rule laid down in that leading case was followed in a later case from Malta: *see* Strickland *vs.* Grima (1930 A.C. 285). In that case the decision of the Court of Appeal in Malta, which had been constituted as the Election Tribunal, was questioned before their Lordships of the Judicial Committee by special leave. At the hearing their Lordships sustained the preliminary objection raised by the respondent that the appeal was incompetent on the ground that article 33 of the Letters Patent conferred on the Court of Appeal a special jurisdiction which was entirely outside the ordinary jurisdiction of the Courts. Article 33 of the Letters Patent, quoted as page 295 of the report did not contain the words to the effect that the decision shall be final and conclusive. But even then their Lordships held the decision of the Election Tribunal to be so in these words:

> 'To their Lordships, these words appear to be clear and distinct. They direct that all question touching the memberships either of the Senate or Legislative Assembly created by the letters patent themselves shall "be referred to and decided" not by the First Hall of the Civil Court, or any Court of first instance, but by the Court of Appeal of Malta, the highest judicial tribunal of the Island. Even if their Lordships had in this matter been without authority to guide them, they would have been led by the words themselves to the clear conclusion that His Majesty had advisedly designated his Court of Appeal in Malta finally to determine all these questions. It appears to their Lordships that the section being found in letters patent, in which His Majesty's own words are used, gains in this respect an added significance, the force of which ought to have full effect given to it.
>
> 'But this view is, their Lordships find, fully confirmed by the authorities, of which Theberge *vs.* Laudry (2 App. Cas. 102) is the most notable.'

32. The latest decision of their Lordships of the Judicial Committee on the question of the finality of the decision of an election tribunal is to be found in *G. E. De Silva* (A.I.R. 1949 P.C. 261). This was a case of an application for special leave to appeal from the decision of an election tribunal constituted under the Ceylon (Parliamentary Elections) Order in Council, 1946. Their Lordships again refused to grant special leave in these words:

> '..... the preliminary question must be asked whether it was ever the intention of creating a tribunal with the ordinary incident of an appeal to the Crown. In this case as in that it appears to their Lordships that the peculiar nature of the jurisdiction demands that this question should be answered in the negative. It was contended for the petitioner that different considerations apply where, as here, the jurisdiction of the election Judge to hear election petitions is not substituted for that of the legislative body itself but is created *de novo* upon the establishment of that body. But this appears to their Lordships to be an unsubstantial distinction and in effect to be met by the later case of Strickland *vs.* Grima. 1930 A.C. 285. Such a dispute as is here involved concerns the right and privileges of a legislative assembly, and whether that assembly assumes to decide such a dispute itself or it is submitted to the determination of a

tribunal established for that purpose, the subject matter is such that the determination must be final, demanding immediate action by the proper executive authority and admitting no appeal to His Majesty in Council. This is the substance of the authorities to which reference has been made, and it is noteworthy that in accordance with them an appeal in such a dispute has never yet been admitted.'

33. The distinction between the jurisdiction of an election tribunal and that of the ordinary Courts and the effect of the words 'final and conclusive' with reference to the decision of the latter category has been clearly brought out by their Lordships of the Judicial Committee in Wi Matua's Will *in re.* (1908 A. C. 448). Repelling the objection of the respondents to the jurisdiction of the Privy Council to interfere in the matter based on section 93 of the New Zealand Act (58 Vict. No. 43), that the decision of the Appellate Court shall be final and conclusive their Lordships, after referring to the decision in (1876 2 A.C. 102), made the following significant remarks:

'The difference between these cases and the present is of the broadest and most essential kind. In them the subject-matter of the protected Jurisdiction connoted functions conferred on the Court by statute which would not otherwise have belonged to it as the general distributor of justice. In the one case Theberge *vs.* Laudry (2 app. Cas. 102)—the subject matter was actually a part of the privilege of Parliament, and therefore entirely alien to the region of prerogative. In the other case the duties imposed on the Court were truly not judicial, but administrative in their nature, and historically they had been originally vested in an administrative commission.'

34. A reference to the history of the practice followed by the Mother of Parliaments in relation to disputed elections also confirms the inference that the determination of election disputes is not a matter for the ordinary courts which are meant to determine disputes relating to civil right. Until the year 1770 when the Grenville Act (10 Geo. 3, c. 16) was passed election disputes were determined by Parliament itself. By that Act the responsibility for determining such disputes was entrusted to a Select Committee of members of Parliament. Even that procedure was not found to be effecient and the right of Parliament to decide such election disputes was transferred by the Parliamentary Elections Act, 1868 (31 and 32 Vict. C. 125) to one Judge and later to two Judges by the Parliamentary Elections Corrupt Practices Act, 1899 (42 and 43 Vict. C. 50). The previous fragmentary law on the subject was consolidated into the Representation of the People Act of 1949 (12 and 13 Geo. 6 c. 68). This Act has repealed either in whole or in part the old Acts including the Parliamentary Elections Act, 1868, the Ballot Act, 1872, the Parliamentary Elections and Corrupt Practices Act 1879, the Corrupt and Illegal Practices Prevention Act 1883 and many others. Part 1st of the Act deals with legal proceedings in connexion with disputed parliamentary elections. Section 110 provides for the constitution of the election court, which has been entrusted with the function of trying parliamentary election petitions. The election court is to consist of two Judges who 'have the same powers, jurisdiction and authority as a judge of the High Court.....'. Section 137 makes provision for a right of appeal on a question of law by special leave of the High Court and the decision of the Court of Appeal 'shall be final and conclusive'.

35. It may be noticed here that the Representation of the People Act, 1951 in India does not make any provision for appeal on any ground whatsoever. Whereas according to the English statute the election court consists of two High Court Judges 'on the rota', the personnel of the Election Tribunal in India is to be drawn from (1) persons who are or have been High Court Judges, (2) persons who are or have been District Judges and are in the opinion of the High Court fit to be appointed as members of such a tribunal and (3) advocates of High Courts not less than ten years' standing and fit in the opinion of the High Courts to be so appointed; with this proviso that the Chairman of the Tribunal has to be either from the first or the second category aforesaid. Such a tribunal as it contemplated by section 86 of the Act is a special Court or tribunal vested with the exclusive jurisdiction of determining election disputes and other matters entrusted to it. Such a tribunal, in my opinion, is not a Court or tribunal subordinate to the High Court. One may ask the question: Did the Parliament consider election tribunals created under the provisions of section 86 of the Act infalliable? Otherwise, why was no provision made for an appeal from their decisions, even though the right of appeal may have been a limited one. Limited to certain questions of a specified kind, as in England? One is tempted to answer the question by saying that Parliament may have thought that such

an election tribunal may not be more fallible than other Courts or tribunals. If there is any lacuna in this respect it is for Parliament to remove that. But in view of the provisions of Part XV of the Constitution read with the Representation of the People Act, 1951, the inference is clear that the makers of the Constitution did not contemplate that election disputes should be treated on the same footing as ordinary civil disputes which can be the subject-matter of one, two or three appeals.

36. The argument that the determination of an election petition should be subject to scrutiny by the High Court either under article 226 or article 227 of the Constitution in order to ensure fuller justice, in my opinion loses sight of the fundamental difference between the determination of a political right specially created by the Constitution and an ordinary civil right based on the common law or created or recognized by statute.

37. At this stage it may not be out of place to take notice of another ground for holding that election disputes should not be protracted and subject to scrutiny by the Civil Courts, because laws' delays have been for long the subject-matter of general criticism, if not of ridicule. Taking the instant case, it has to be remembered that the polling for the election in question took place at the end of December 1951 and the beginning of January 1952. An elected body whose term of office is confined to five years can ill afford to keep election disputes pending for years. It has therefore been thought necessary by the Legislature to provide for a special tribunal of exclusive jurisdiction to determine election disputes as expeditiously as feasible in the circumstances.

38. An impassioned appeal was made to us in the name of justice, and it was argued that unless the power of the High Courts to interfere in election disputes was recognized there was not only a possibility but a probability of justice being sacrificed in some cases. In my opinion, justice as ordinarily understood has reference to matters of civil or criminal disputes and not to election matters which are of a political nature.

39. It is noteworthy that not a single instance has been brought to our notice to show that either in England or in anyone of its colonies or dependencies the ordinary Courts have interferred with the dicision of an election tribunal created by a legislation setting up a democratic constitution. No such case has been brought to our notice even from the United States of America where the judiciary has found itself exercising powers of judicial interference of the widest character. That is so because it is now one of the established principles of a democratic constitution that the matter of election to a democratic legislature and disputes relating to such elections should be expeditiously dealt with by a tribunal of exclusive jurisdiction, not amenable to judicial interference by the ordinary Courts. That must be the reason why there is no decision of the House of Lords or of the Judicial Committee of the Privy Council which has interfered with the decision of an election tribunal.

40. It has been contended on behalf of the petitioner that the British Constitution envisages Parliament as supreme in all respects, and therefore election disputes in relation to such a Parliament are determined by an election court which is not subject to the ordinary processes of the civil Courts. It is further contended that the Indian Parliament and the State Legislature are not so supreme and that therefore the election courts of exclusive jurisdiction created by such Legislatures should not have that kind of finality attaching to the decisions of such election tribunals. But the Australian and the Canadian Constitutions and other such federal Constitutions contemplate the creation of Legislatures of enumerated powers, but even in those countries no instances of judicial interference with the decisions of election tribunals have been brought to our notice. Such an utter lack of precedents of this kind may justly be attributed to the well established rule referred to above.

41. Assuming that I am wrong in holding that the election tribunals are superior tribunals of exclusive jurisdiction, whose determinations are not amenable to the special powers given to the High Courts under articles 226 and 227 of the Constitution, the position has to be examined whether in the instant case there is any usurpation of jurisdiction by the election tribunal or a refusal to exercise jurisdiction vested in it by law. It was contended on behalf of the petitioner that the adverse decision of the tribunal affecting the petitioner contained in paragraph 69 of the majority judgment was tantamount to a failure on its part to exercise jurisdiction vested in it by law, *viz.*, section 100(2) (a) of the Representation of the People Act, 1951, which is in these terms:

'that the result of the election has been materially affected by the improper reception or refusal of a vote or by the reception of any vote which is void, or by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under the Act or of any other Act or rules relating to the election, or by any mistake in the use of any prescribed form, the Tribunal shall declare the election of the returned candidate to be void.'

Thus, the tribunal had to decide the question whether the irregularity or illegality complained of in the instant case had materially affected the result of the election. That is a question which the tribunal had to determine for itself. The determination of this question was not dependent upon the determination of any collateral facts. Assuming, without deciding that the tribunal misdirected itself in taking into consideration other matters in coming at its conclusion it cannot be said that the tribunal has refused to exercise a jurisdiction vested in it by law. The utmost that can be said is that it has gone wrong in determining a question which was within its province to decide.

42. In this connexion our attention was called to the decision of their Lordships of the Judicial Committee of the Privy Council in The Colonial Bank of Australasia *vs.* Willan (L.R. 5 P.C. 417), in which it has been laid down that even where certiorari has been taken away by statute the superior Court is not absolutely deprived of its power of judicial interference and that even in such cases a *writ* can issue on the limited ground either of a manifest defect of jurisdiction in the tribunal that made the order or of manifest fraud in the party procuring it. In the course of their judgment their Lordships have made the following observations which are relevant to the controversy before us:

'Objections founded on the personal incompetency of the Judge, or on the nature of the subject-matter or on the absence of some essential preliminary, must obviously, in most cases, depend upon matters which, whether apparent on the face of the proceedings or brought before the superior Court by affidavit, are extrinsic to the adjudication impeached. But an objection that the Judge has erroneously found a fact which, though essential to the validity of his order, he was competent to try, assumes that, having general jurisdiction over the subject-matter, he properly entered upon the inquiry, but miscarried in the course of it. The superior Court cannot question adjudication upon such an objection without assuming the functions of a Court of appeal, and the power to re-try a question which the judge was competent to decide.'

43. In the instant case objections to jurisdiction are not founded either on the personal incompetency of the tribunal or that the nature of the subject-matter of the enquiry was beyond their province or that some essential preliminary condition had not been satisfied. It is the election tribunal itself and none other which was seized of the matter and which was expected to exercise exclusive jurisdiction in respect of the entire controversy. The objection, therefore, in the instant case may be of the last kind envisaged in the passage quoted above *viz.*, that though the election tribunal was competent to try the issue and had rightly assumed jurisdiction over the subject-matter and had properly entered upon the enquiry it had in so doing misdirected itself as to the result of the enquiry. That misdirection may be due to the tribunal having made a mistake of fact or of law or of procedure or even of taking into consideration extraneous matters. But, even assuming that all these defects are there in the exercise of its exclusive jurisdiction the tribunal was till within the powers in coming to the conclusion to which it did. Hence, as pointed out by their Lordships this Court, assuming that it is a superior Court in relation to the tribunal, cannot quash that adjudication without assuming the functions of a court of appeal and retry a question which the tribunal itself was competent to decide.

44. In that view of the matter, in my opinion, the following observations quoted at page 444 in that judgment have no place so far as the present controversy goes:

'It is a general rule that no Court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends; and however its decision may be final on all particulars, making up together that subject-matter which, if true, is within its jurisdiction, and however necessary in many cases it may be for it to make such a preliminary inquiry, whether some collateral matter be or be not within the limits, yet upon this preliminary question its decision must always be open to inquiry in the superior Court.'

45. Reference was made to the decision in Rex *vs.* Shoreditch Assessment Committee, [(1910) 2 K.B. 859] and to the passage at page 880 containing the observations of Farwell L.J. But that case has reference to a Court which had to make enquiry as to the fulfilment of a condition precedent to its assumption of jurisdiction, and it was in that context that the observation was made that a tribunal of inferior jurisdiction cannot by its wrong decision give itself jurisdiction. As already indicated the election tribunal is not a Court or tribunal of that description.

46. In view of those considerations, in my opinion it cannot be said that the election tribunal in the instant case has either exceeded its jurisdiction or refused to exercise a jurisdiction vested in it by the Representation of the People Act, 1951. That being so, it is manifest that no relief can be granted to the petitioner by this Court.

47. In this view of the case it is not necessary to consider the other questions canvassed at the Bar, *viz.*, whether the Election Commission or the Union Government was a necessary party to the petition or whether the provisions of rule 47 of the Rules under the Representation of the People Act, 1951 were mandatory or only directory. I would therefore dismiss this application. There will be no order as to costs.

MISCELLANEOUS PETITION NO. 174 OF 53

PER MUDHILKAR J.

This is a petition under articles 226 and 227 of the Constitution for issue of a writ in the nature of certiorari for quashing the order of the Election Tribunal, Hoshangabad, dismissing the petitioner's petition for setting aside the election of the respondent no. 1. In addition to this relief, the petitioner also seeks a declaration to the effect that the respondent no. 1 was not duly elected to a seat in the House of the People from the Hoshangabad Constituency and a further declaration that the petitioner has been duly elected to the seat.

2. The facts which led up to this petition are briefly these: The petitioner and respondents 1 to 5 were duly nominated for election to a seat in the House of the People from the Hoshangabad Parliamentary Constituency. Respondents 4 and 5 withdrew their candidature and so there were only four candidates left in the field. The polling for the election to the above seat took place on December 31st, 1951 and on January, 7, 17 and 24, 1952. The counting of the votes commenced on January, 25, 1952 and ended on February 3, 1952. After the counting, the Returning Officer declared the respondent No. 1 duly elected by a majority of 174 votes. The votes which were declared to be secured by each of the candidates are as follows:

Respondent No. 1	..	65375
Petitioner	..	65201
Respondent No. 2	..	20653
Respondent No. 3	..	13609

3. The election of the respondent No. 1 was called in question by the petitioner by an election petition presented on 23rd April, 1952 before the Election Commission, and a Tribunal consisting of the respondent Nos. 6, 7 and 8, with respondent no. 6 as the Chairman was appointed by the Election Commission for deciding election petition. The Tribunal after recording evidence dismissed the petition and its decision was published in the Gazette of India Extraordinary Part II, Section 3, dated the 15th April, 1953.

4. The election of the respondent no. 1 was challenged on the following amongst other grounds :

> "That in the ballot boxes used at the polling stations Sobhapur nos. 316 and 317 in Sohagpur part of the Constituency ballot papers bearing marks different from those which were authorised for use at those polling stations were found. These ought to have been rejected by the Returning Officer under Rule 47 of the Representation of People Rules, 1951. These were, however, improperly accepted and illegally counted by the Returning Officer, if these votes found in the boxes, both of the petitioner and the respondent no. 1 had been rejected as required by rule 47 *ibid* the respondent no. 1 would not have secured the marginal advantage of 239 votes, which he actually did at these two polling stations.

That the Returning Officer did not properly verify the account of votes submitted by the Presiding Officers of the polling stations as required by Rule 49 *ibid.* The petitioner cited in the connection 16 instances among many such, in which the ballot papers found in the ballot boxes of the candidates at those polling stations were found to have exceeded the number of the ballot papers which should have been found in the boxes at those stations according to the account in Form 10. There were thus serious mistakes in the account of votes throughout the Hoshangabad Parliamentary Constituency, and therefore a total recount of valid votes was necessary."

5. According to the petitioner the election of the respondent No. 1 was void and illegal and that the result of the election was materially affected by the improper acceptance and illegal counting of the votes at Sobhapur polling stations by the Returning Officer and also by reason of the omission of the Returning Officer to verify the accounts of the ballot papers submitted to him. The petitioner further counted that in fact he had secured a majority of valid votes and therefore he was entitled to a declaration that he was duly elected. The petitioner also pointed out that in accordance with rule 28 of the Representation of the People Rules, the Election Commission had finally decided that ballot papers to be used for the purpose of voting at election to the House of the People from all Constituencies in Madhya Pradesh shall have a thick green bar printed near the left margin of the ballot paper and a distinguishing mark. He stated that in the ballot boxes used at the polling stations Nos. 316 and 317 of the Sohagpur part of the Hoshangabad Constituency ballot papers bearing different marks from those prescribed by the Election Commission were found. His contention is that all such ballot papers ought to have been rejected by the Returning Officer under the provisions of rule 47(1) (c) of the Rules. The petitioner pointed out that the respondent No. 1 polled 301 such votes and the votes polled by him at the above two polling stations were 62 and that after the rejection of all these invalid votes the petitioner would secure a majority of valid votes.

6. It may be mentioned that while counting was going on the Returning Officer brought to the notice of the Election Commission that the ballot papers which were intended for the election to a seat in the Legislative Assembly bearing a chocolate coloured bar, were through mistake given to the votes at the two aforesaid stations for voting at the election to the House of the People. There was no marked difference between the distinguishing mark on the two sets of ballot papers and it was because of this that the mistake was committed by the polling officers at these polling stations. It would also appear that a mistake of this kind had been made at some other polling stations also. Before the receipt of the reply from the Election Commission the votes given on the ballot papers not bearing the distinguishing mark for the election to the Parliament were rejected at these polling stations. In the meanwhile, the reply of the Election Commission was received and the Returning Officer was informed that the votes recorded even on the ballot papers meant for the seat to the Assembly should be regarded as valid.

7. The petitioner's contention was that the Election Commission had no right to validate the votes and this contention was upheld by the Election Tribunal. The Election Tribunal further held that rule 47(1) (c) which requires that invalid votes should be rejected, is mandatory that "non-compliance with that rule or even acceptance of the other votes which are void will have no consequence except when thereby the result of the election is materially affected." It then further observed :

"Here the petitioner wants us to consider the effect of the non-compliance of Rule 47(1) (c). That non-compliance is founded upon the initial disregard of Rule 23 *ibid* read with Rule 28. Indeed these sections are so intimately connected that one cannot be considered apart from the other. In this case we have not only to see how the disregard of a particular rule has affected the petitioner. We have to consider how the non-compliance of the two rules affected the election as a whole. In our view we can go further. In fairness we must consider the cumulative effect of all violation of law or disregard of rules to see if the result of the election was thereby materially affected. The true test in our opinion of determining whether the result of the election is materially effected by the non-compliance of any rules is to see what would have happened if these rules were strictly obeyed and not violated. In this particular case, by sheer mistake, caused no doubt by the faintness of the distinguishing mark, the officers employed at the Sobhapur Polling Station gave to the Parliamentary electors ballot papers meant for use at the State Assembly election. If that mistake had not been committed and

there was no non-compliance of rule 23 (read with rule 28) we are sure that the correct ballot papers would have been found in the box of the respondent No. 1. In effect the initial non-compliance of the rule 23 read with the rule 28 committed by the election officers makes for the disregard of Rule 47(1) (c) and to the same extent too. In other words if rules 23 and 28 had not been disregarded, the respondent No. 1 would have got all those votes which it is claimed must be rejected. The total effect of the disregard of the above rule 47(1) (c) and 23 read with rule 28 is that the respondent No. 1 would have been where he is now except that petitioner would get about 80 more votes on account of mistake in calculation. We, therefore hold that the result of the election has not been materially affected by the non-compliance of this rule and there is therefore, no case for declaring the election of the respondent No. 1, to be void."

and upon this view dismissed the election petition. The third member of the Tribunal held that rule 47(1) (c) was directly and not mandatory and also held, that non-compliance with this rule did not render the votes invalid or the election void.

8. The petition before us is opposed by the respondent No. 1 on various grounds. In the first place it is said that the jurisdiction of this Court to entertain the petition is barred by article 329(b) of the Constitution. It is stated that rule 47(1) (c) is directly and not mandatory and that therefore non-compliance with that rule did not render the votes invalid or the election void. Then it is stated that the Election Commission having invalidated the votes the Election Tribunal was bound to treat them as valid. It is then contended that the Election Tribunal has ceased to exist and that therefore there was no Tribunal to which this Court would issue a direction. It is also said that the Election Commission is a necessary party to the petition because the order of this Court cannot be given effect to unless it is a party to the petition therefore it is contended that the Election Commission not having been made a party to the petition the petition is untenable. Finally, it is said that the petitioner has no substantial right to assert or to enforce, that therefore it cannot be said that any injustice has been done to him and that therefore this Court ought not to interfere.

9. At the outset it is necessary to consider whether quite apart from the provisions of article 329 of the Constitution article 226 can be brought in aid in a case of this kind. Article 226 enables this Court to issue a direction, order or writ to any person or authority within the territorial limits of its jurisdiction. Thus, for the issue of a direction, order or writ there must be in existence either a person or an authority within the territorial jurisdiction of this Court. The Election Tribunal is no doubt an authority but having been appointed by the Election Commission for a specific purpose it cannot be deemed to exist after that purpose is served. In other words, an Election Tribunal stands dissolved automatically after it gives its decisions in the cases sent to it by the Election Commission for decision. It is common ground that no election petition is pending at this date before the Hoshangabad Tribunal of which respondents 6, 7 and 8 were members. It must, therefore, be held that the Tribunal does not exist any longer and that consequently no direction, order or writ can be made to it since that is the position article 226 is not available.

10. Though article 226 cannot be availed of by this Court it seems to me that article 227 of the Constitution can be availed of. In *Sheoshankar* v. *M.P.* State Government (A.I.R. 1951 Nagpur 58 F.B.) Mangalmurti J. and I observed as follows :

"The main purpose of Article 227 appears to be to empower the High Court to call for returns from all courts and tribunals, make general rules, prescribe forms for regulating the practice and proceedings of such Courts, settle tables of fees and so on. Article 226 does not touch these or similar matters. It is in order to indicate the plenitude of the power conferred upon the High Court with respect to Courts and tribunals of every kind that the Constitution conferred the power of superintendence on the High Court. It is true that the absence of a provision similar to that contained in sub-section (2) of section 224 of the Government of India Act of 1935 enables the High Court, under this Article, to exercise revisional jurisdiction with respect to the decisions given by all Courts and tribunals and that to this extent there is a certain amount of over-lapping between clause (1) of Article 227 and Article 226. That, however, is inevitable. Of course, the power of superintendents conferred upon a High Court is not as extensive as the power conferred upon it by Article 226.

> Thus ordinarily it will be open to the High Court, in the exercise of the power of superintendence only to consider whether there is an error of jurisdiction in the decision of a Court or tribunal subject to its superintendence, whereas there is no limitation under Article 226."

The Election Tribunal having been constituted for a limited purpose must be deemed to be a Tribunal of limited jurisdiction and thus amenable to the jurisdiction of this Court under article 227 of the Constitution. In this connection I would refer to Rex *v.* Shoreditch Assessment Committee Morgan, *ex parte* (1910) 2 K.B. 859 at 880 where Farwell L. J. observed:

> "Subjection in this respect to the High Court is a necessary and inseparable incident to all tribunals of limited jurisdiction; for the existence of the limit necessitate an authority to determine and enforce it."

Similarly, in Shripad *v.* Divatia (A. I. R. 1948 Bombay 20) Bhagwati J. held that though Election Commissioners are appointed by the Governor for deciding election disputes they are amenable to the writ jurisdiction of the High Court. Finally, I would refer to Shankar *v.* Returning Officer Kolaba (A.I.R. 1952 Bombay 277 at 281) where it has been held that the power of superintendence given to the High Courts over tribunals by article 227 extends even to an Election Tribunal.

11. The next question is whether article 329(b) is a bar to the exercise of the powers conferred on this Court by article 227 of the Constitution. On behalf of the respondent No. 1 it is argued on the analogy of the law in England that Parliament being the sole judge of its own composition, a Court of law has no jurisdiction to decide any matters pertaining to its composition, such as the question whether a particular person was duly elected to Parliament or not. In the first place, I would like to point out that the analogy of the law in England cannot be used in India for the reason that there the Parliament is supreme whereas here neither the Parliament nor the State Legislature is supreme. Ours is a Constitution of enumerated powers and whether the Parliament has power over a particular matter has to be ascertained by reference to the Constitution.

12. The learned counsel for the respondent No. 1 refers to clause (5) of article 105 of the Constitution and says that the privileges of the Parliament in India in regard to matters such as these are the same as those of the British Parliament. Clause (3) of article 105 reads thus:

> "In other respects, the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House, shall be such as may from time to time be defined by Parliament by law, and, until so defined shall be those of the House of Commons of the Parliament of the United Kingdom, and of its members and committees, at the commencement of this Constitution."

13. It is true that formerly controverted elections were tried and determined by the whole House of Commons as mere party questions, upon which the strength of contending factions might be tested. In order, however, to prevent so notorious a perversion of justice, as May points out in his Parliamentary Practice (75th Edn. p. 184) the House consented to submit the exercise of its privilege to a tribunal constituted by law, which, though composed of its own Members, should be appointed so as to secure impartiality and the administration of justice according to the laws of the land. Accordingly the Grenville Act was passed in the year 1770 and the persons who were appointed used to be the members of the House and even though they were drawn by lots there were allegations of partiality and incompetence. In 1839, therefore, an Act was passed establishing a new system, upon different principles, increasing the responsibility of individual Members, and leaving but little to the operation of chance. This principle was maintained until 1868, when the jurisdiction of the House in the trial of controverted elections was transferred by statute to the Courts of law. Finally, by Part III of the Representation of the People Act, 1949, the trial of controverted elections is confided to judges selected from the judiciary in the appropriate part of the United Kingdom. Thus, in so far as electoral matters are concerned, at the commencement of the Constitution the House of Commons in England had no privilege and the validity or otherwise of an election of its members had to be determined by the Statutory Tribunals created by the Representation of the People Act, 1949. It would, therefore, follow that the Parliament of this Country does not possess a privilege of determining the validity of elections to either House.

14. What is next to be ascertained is the effect of article 329(b) of the Constitution on the powers of this Court. Article 329(b) reads thus :

> "Notwithstanding anything in this Constitution.....
>
> * * *
>
> (b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature."

The non-obstante clause in this Article indicates that the provisions of this article shall prevail despite anything to the contrary in any other provision of the Constitution. As was observed by a Division Bench of this Court consisting of the Chief Justice and myself in miscellaneous Petition No. 230 of 1952, decided on 8th January, 1953 :

> "Thus, where a certain power has been conferred on one tribunal and a similar power is conferred on another, there is no inherent repugnancy between the powers of those tribunals. When the intention is that each can exercise its powers independently of the other, it becomes necessary to use a *non-obstance* clause."

Had article 329(b) not been there then election disputes could have been brought to the High Court directly under article 226. Article 329(b) provides that such disputes should be adjudicated upon by an Election Tribunal and none else. It follows therefore that the Election Tribunal alone can adjudicate upon election disputes and the High Court has no jurisdiction to enquire into them even under article 227 of the Constitution.

15. What is however challenged here is not the election itself but the decision of the Tribunal. No doubt, the petitioner also wants this Court to declare the election of the respondent No. 1 void and further wants that he himself be declared elected. I have no doubt that neither of these two reliefs can be granted to the petitioner by this Court in view of the provisions of article 329(b). At the same time, I am clear that these reliefs are separable from the first relief of which he has claimed, that is of quashing the order of the Tribunal.

16. Shri Pathak strongly relied on the decision of the Supreme Court in N. P. Ponnuswami *v.* Returning Officer, Namakkal Constituency and others (1952 S.C.R. 218) in support of the contention that not only article 329(b) of the Constitution but also sections 80 and 105 of the Representation of the People Act bar the jurisdiction of this Court, even to consider whether the Election Tribunal has acted within the scope of its jurisdiction or not or has refused to exercise the jurisdiction committed to it. In that case the question was whether the High Court had jurisdiction to issue a writ of *certiorari* under article 226 of the Constitution and to quash the order of the Returning Officer rejecting the nomination paper of the candidate and directing the Returning Officer to include the name of the candidate in the list of valid nominations to be published. Their Lordships held that the scheme of Part XV of the Constitution, in which article 329(b) occurs, and the Representation of the People Act seems to be that any matter which has the effect of vitiating an election should be brought up only at the appropriate stage in an appropriate manner before a special tribunal and should not be brought up at an intermediate stage before any Court.

17. In the course of the judgment Fazl Ali J. who delivered the judgment of the Court observed :

> "....any matter which has the effect of vitiating an election should be brought up only at the appropriate stage in an appropriate manner before a special tribunal and should not be brought up at an intermediate stage before any Court. It seems to me that under the election law, the only significance which the rejection of a nomination paper has consists in the fact that it can be used as a ground to call the election in question. Article 329(b) was apparently enacted to prescribe the manner in which and the stage at which this ground and other grounds which may be raised under the law to call the election in question could be urged. I think it follows by necessary implication from the language of this provision that those grounds cannot be urged in any other manner, at any other stage and before any other court. If the grounds on which an election can be called in question could be raised at an earlier stage and errors, if any, are rectified, there will be no meaning in enacting a provision like

article 329(b) and in setting up a special tribunal. Any other meaning ascribed to the words used in the article would lead to anomalies, which the Constitution could not have contemplated, one of them being that conflicting views may be expressed by the High Court at the pre-polling stage and by the election tribunal, which is to be an independent body, at the stage when the matter is brought up before it."

Dealing with the Representation of the People Act, 1951, his lordship observed:

"Obviously, the Act is a self-contained enactment so far as elections are concerned, which means that whenever we have to ascertain the true position in regard to any matter connected with elections, we have only to look at the Act and the rules made thereunder.....

Section 80, which is drafted in almost the same language as article 329(b) provides that 'no election shall be called in question except by an election petition presented in accordance with the provision of this part.'.....

Section 105 says that 'every order of the Tribunal made under this Act shall be final and conclusive'....., and it should be noted that there is no provision anywhere to the effect that anything connected with elections can be questioned at an intermediate stage."

Further his Lordship observed :

"It is now well-recognized that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of.....

"That being so, I think it will be a fair inference from the provisions of the Representation of the People Act to state that the Act provides for only one remedy, that remedy being by an election petition to be presented after the election is over, and there is no remedy provided at any intermediate state."

"It was argued that since the Representation of the People Act was enacted subject to the provisions of the Constitution, it cannot bar the jurisdiction of the High Court to issue writs under article 226 of the Constitution. This argument however is completely shut out by reading the Act along with article 329(b). It will be noticed that the language used in that article and in section 80 of the Act is almost identical, with this difference only that the article is preceded by the words 'notwithstanding anything in this Constitution'. I think that those words are quite apt to exclude the jurisdiction of the High Court to deal with any matter which may arise while the elections are in progress."

Observsing that the more reasonable view seems to be that article 329 covers all "electoral matters" his lordship summarized the conclusion arrived at by him thus:

"(1) Having regard to the important functions which the legislatures have to perform in democratic countries, it has always been recognized to be a matter of first importance that elections should be concluded as early as possible according to time schedule and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over, so that the election proceedings may not be unduly retarded or protracted.

(2) In conformity with this principle, the scheme of the election law in this country as well as in England is that no significance should be attached to anything which does not affect the 'election'; and if any irregularities are committed while it is in progress and they belong to the category or class which, under the law by which elections are governed, would have the effect of vitiating the 'election' and enable the person affected to call it in question, they should be brought up before a special tribunal by means of an election petition and not be made the subject of a dispute before any Court while the election is in progress."

After referring to the decision of the Privy Council in *Theberge* v. *Laundry* (1876) 2 A. C. 102 his Lordship observed:

"The points which emerge from this decision may be stated as follows—

(1) The right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it.

(2) Strictly speaking, it is the sole right of the Legislature to examine and determine all matters relating to the election of its own members, and if the legislature takes it out of its own hands and vests in a special tribunal an entirely new and unknown jurisdiction, that special jurisdiction should be exercised in accordance with the law which creates it."

At the same time his Lordship made it clear—

"It should be mentioned here that the question as to what the powers of the High Court under articles 226 and 227 and of this Court under article 136 of the Constitution may be, is one that will have to be decided on a proper occasion."

I have quoted extensively from the judgment of his Lordship in order to show that the view taken by him is that in so far as *electoral matters* are concerned, the jurisdiction of this Court is barred by article 329(b) of the Constitution and by sections 80 and 105 of the Representation of the People Act, which Act has to be read as part of the Constitution.

18. Their Lordships were not dealing with a case of the present type where the question to be considered is whether the Election Tribunal has acted within the ambit of its authority or whether it has refused to exercise the jurisdiction vested in it by law. There is nothing in the judgment of their Lordships which indicates that the jurisdiction of this Court or indeed of a civil Court to examine into cases where the provisions of an Act have not been complied with by the statutory tribunal is taken away. Indeed, it was observed in this judgment,

"It was conceded at the bar that the effect of this difference in language is that whereas any law made by Parliament under article 327, or by the State Legislature under article 328, cannot exclude the jurisdiction of the High Court under article 226 of the Constitution, that jurisdiction is excluded in regard to matters provided for in article 329."

This concession of the counsel appears to have been accepted as proper by their Lordships. Thus it would follow that only such matters as are dealt with in article 329 are excluded from the consideration by this Court under articles 226 and 227 of the Constitution. Finality is not given by Article 329(b) to the order of the Tribunal nor is the order placed beyond the purview of the High Court.

19. A reference may be made to the decision in Secretary of State for India *v.* Mask & Co. (I.L.R. 1940 Madras 599 at 614 P.C.), which has been referred to in the judgment of the court, though in another connection. Their Lordships of the Privy Council have stated—

"It is settled law that the exclusion of the jurisdiction of the Civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well-settled that even if jurisdiction is so excluded, the Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."

To the limited extent, therefore, of considering whether the Election Tribunal has complied with the provisions of the law or has failed to exercise the jurisdiction vested in it by law, it must be held that this Court, at any rate, has jurisdiction.

20. It is argued that interference with the decision of the Election Tribunal will affect the election. I may point out that the Respondent No. 1 was not elected as a result of the decision of the Election Tribunal but as a result of the counting of votes by the Returning Officer, if, therefore, this Court were to set aside the order of the Election Tribunal, the result of the election will not be affected. The only consequence of this order would be that the election petition will have to be decided afresh.

21. I am aware of the decision of a Division Bench of the Court in Ramkrishna *v.* Thakur Daoosingh, (1953 N.L.J. 458) where it has been held that the fact that an election petition has been filed and dismissed or allowed does not remove the bar of article 329(b) as that clause itself contemplates only one mode of procedure and not two. The learned Judges in that case has to consider whether this Court had jurisdiction to interfere under article 226 or 227 of the Constitution with an

order of an Election Tribunal declaring void the election of the candidate declared to be elected by the Returning Officer and declare the petitioner before it duly elected. The learned Judges held that the intention of the consideration seems to be that election matter should be left to the machinery provided for the consideration of election petitions in the law to be made under Article 327 and that no other authority should do what the Tribunal and the Election Commission are required under law to decide. They seem to be of the view that in certain circumstances the proceedings before the Tribunal, including the decision of the Tribunal, are to be included in the process of election. It may be that in certain circumstances the decision of the Election Tribunal may be regarded as a part of the election. Where, however, the Election Tribunal has exceeded its jurisdiction or failed to exercise jurisdiction vested in it by law, it cannot be said that its decision affects an election and is on that account a part of the process of election.

22. No doubt, the learned Judges have also held that by reason of the *non-obstante* clause in Article 329(b) the jurisdiction of the High Court under articles 226 and 227 is excluded. I am prepared to grant that in a case where the question is not whether the Tribunal has exceeded its jurisdiction or refused to exercise it, this Court may not be able to interfere. Where, however, the question raised pertains to jurisdiction, the bar created by article 329(b) would not come in the way of the exercise of the powers conferred upon this Court by article 227.

23. What article 329(b) takes out of the jurisdiction of this Court is any matter *pertaining* to an election but where, as here, the matter relates only to a decision of a tribunal which is not a part of the process of election, that provision cannot operate as a bar. As has been observed in Rex *v.* Shoreditch (Cit. sup.)—

> "No tribunal of inferior jurisdiction can by its own decision finally decide on the question of the existence or extent of such jurisdiction; such question is always subject to review by the High Court, which does not permit the inferior tribunal either to usurt a jurisdiction which it does not possess, whether at all or to the extent claimed, or to refuse to exercise a jurisdiction which it has and ought to exercise."

Thus, if an Election Tribunal decides a petition on a fantastic ground, that is a ground which is not provided for in the Representation of the People Act, or where it refuses to exercise its jurisdiction when upon the facts it is bound to exercise it, then certainly this Court can and must interfere. I am thus of the view that the power of this Court to interfere in a case like the present is not taken away by the provisions of article 329(b).

24. It is then said that section 105 of the Representation of the People Act takes away the jurisdiction of the High Court even to consider whether the Tribunal has exercised its jurisdiction or has refused to exercise it. That section reads thus:

> "Every order of the Tribunal made under this Act shall be final and conclusive."

It must be remembered that this section is to be found in the law enacted by Parliament and no Act of Parliament can take away the power which the Constitution has conferred on this Court. It is, however, argued that the Act has been made by the Parliament under the powers conferred under article 327 of the Constitution and therefore the whole, or at any rate, section 105 thereof, must be deemed to be a part of the Constitution. In my opinion this argument is wholly untenable. It may be mentioned that there is no *non-obstante* clause in article 327 of the Constitution. On the other hand, article 327 is *subject* to the other provisions of the Constitution. The law which the Parliament enacts cannot, therefore, derogate from any provisions of the Constitution.

25. The question then is whether the Election Tribunal has committed any error pertaining to jurisdiction, that is to say, whether it has refused to exercise jurisdiction vested in it by law or has usurped jurisdiction. As already pointed out the Election Tribunal has come to the conclusion that the provisions of rule 47(1)(c) are mandatory that the Returning Officer ought to have rejected 371 voting papers because they did not bear the prescribed mark, that the Election Commission could not validate these voting papers, that the rejection of all such ballot papers would have deprived the respondent No. 1 of the marginal advantage of 239 votes and that the petitioner could have thus got a majority of valid votes. Having come to this conclusion what the Tribunal had to decide was whether the result of the election had been materially affected by the improper reception of these 71 votes. Instead of addressing itself to this question the Tribunal proceeded to ascertain the effect of the disregard by the Polling Officer of rules

read with rule 28. (See paragraph 69 of the judgment of the Election Tribunal reproduced in paragraph 7 of this Order). The Election petition is not founded on any allegation that the Returning Officer did not do his duty as required by rule 23(1), which deals with the procedure before the recording of votes, or any rule other than rule 47(1)(c). It was therefore not open to the Tribunal under section 100(2)(c) of the Representation of People Act to consider whether the result of the election was affected by a non-compliance with a provision of the rules or the Act other than the one complained of. Therefore, in taking into consideration the non-compliance with the provisions of rule 23 it acted beyond the jurisdiction and in failing to consider the effect of the non-compliance with rule 47(1)(c) it failed to exercise the jurisdiction vested in it by law.

26. It was argued at great length that the provisions of rule 47(1)(c) are directory and not mandatory and that the opinion of the majority of the members of the Tribunal that they are mandatory is erroneous. In my opinion, it is not open to us to consider whether the view taken by the majority is correct or not. The reason for saying so is that the Tribunal had jurisdiction to decide every question of fact and law raised before it and its decision on such a question could not be questioned by this Court under article 227 of the Constitution except when the question decided by it affected its initial jurisdiction. The finding which the majority of the members of the Tribunal have given regarding the nature of the provisions of rule 47(1)(c) does not affect its initial jurisdiction and therefore that finding cannot be questioned before this Court.

27. It was argued that this Court had no jurisdiction to entertain this petition because the Tribunal cannot be deemed to be situate within the territorial jurisdiction of this court. In support of this argument Shri Hazarnavis, junior counsel for the respondent No. 1, referred to section 88 of the Representation of the People Act. That section runs thus:

> "The trial shall be held at such place as the Election Commission may appoint:
>
> Provided that a Tribunal may, in its discretion, sit for any part of the trial at any other place in the State in which the election to which the petition relates has taken place."

28. According to the learned counsel the Election Commission could fix any place whatsoever for the trial of the election petition and that it was not bound to fix the trial of the petition at a place within the limits of the State in which the petition arose and that the mere fact that the Election Commission fixed Hoshangabad as the place for the trial of this petition is not sufficient to give this Court jurisdiction over the Tribunal. In support of this contention the learned counsel relied on Ryots of Garabandho *V.* Zamindar of Parlakimedi (A.I.R. 1943 Privy Council 164).

29. The argument of the learned counsel ignores from consideration the proviso to section 88. In my opinion, the main section and the proviso have to be read together and after they are so read, it is clear that the place of the trial must be situate within the State from which the petition arises. I am fortified in this view by the observations of Lord Herschell in *West Derby Union case* (1897 A.C. 647 at 655) which were quoted with approval by Viscount Maugham in *Jennings and Another* v. *Kelly* (1939) 4 All. E.R. (H. L. 464 at 470):

> "Of course a proviso may be used to guide you in the selection of one or other of two possible constructions of the words to be found in the enactment, and show when there is doubt about its scope, when it may reasonably admit of doubt as to its having this scope or that, which is the proper view to take of it."

After quoting this his Lordship added:

> "My Lords, that is precisely the method of construction which, in my view, is applicable in the present case. I will add that the words beginning 'Provided that' are, in my opinion, additional and explanatory words, necessary for the purpose of giving a more definite meaning to the preceding words—namely, for the purpose of removing doubt as to its scope—and they might easily have been incorporated in the earlier part of the section, at the risk of making it rather more cumbrous than it is."

His Lordship then observed:

> "It cannot, I think, be disputed that in construing a section of an Act of Parliament, it is constantly necessary to explain the meaning of the words by an examination of the purport and effect of other sections in the same Act. A number of striking examples will be found in Maxwell on the Interpretation of Statutes, 8th Edition, pp. 27, 28.

This principle is equally applicable in the case of different parts of a single section, and none the less so because the latter part is introduced by the words 'provided that' or like words. There can, I think, be no doubt that the view expressed in Kent's Commentaries on American Law, 12th Edn. Vol. I, p. 463, cited with approval in Maxwell on the Interpretation of Statute, 8th Edn. p. 140, is correct.

'The true principle undoubtedly is, that the sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause, and proviso taken and construed together, is to prevail.' "

In my opinion, this is sufficient to dispose of the point urged by Shri Hazarnavis.

30. The learned counsel then argued that in the absence of the Election Commission as a party to this proceeding, the order of this Court cannot be given effect to. He further argued that the Election Commission being a necessary party to the petition and being outside the jurisdiction of this Court the petition itself was untenable. Reliance was placed on the decision in *Ramkrishna's case* (cit. sup.) in support of the proposition. The learned Judges observed:

"The order of the Election Tribunal when adopted by the Election Commission and notified, becomes an order of the Election Commission. The Election Tribunal is nothing more than an amanuensis of the Election Commission, and the order made by the Election Tribunal, when adopted by the Election Commission, becomes not only conclusive but takes its effect for all intents and purposes as the act of the Election Commission. To issue a process against a body which is now *functus officio* to quash its order, would, in the events which have happened, be a process against the Election Commission itself. That is not possible because it has now been authoritatively ruled that the Election Commission is not subject to the writ process of the High Court within the territorial jurisdiction of which the Commission is not situate. It cannot be denied that in the present matter the Election Commission is not within our territorial jurisdiction and we cannot therefore by a writ compel the Election Commission to choose a course other than what it has. No Court does indirectly which it cannot do directly."

31. With great respect to the learned Judges I would point out that the very assumption that the Tribunal is an 'amanuensis' of the Election Commission is unjustified and therefore the conclusion based on it is erroneous. The Tribunal does, no doubt, owe its constitution to the Commission, but it is appointed to decide a petition according to its own lights. It is in no sense a servant of the Commission nor can the Commission dictate to it as to how it should decide a petition. On the other hand, it is the Commission which has to give effect to the decision of the Tribunal: The Commission has to register the decision of the Tribunal and have it published in the manner set out in section 106 of the Representation of the People Act and in that sense it may perhaps be permissible to regard it as the 'amanuensis' of the Tribunal but no *vice versa*.

32. The order which takes effect upon the publication is the order of the Tribunal and not of the Commission. This is clear from section 107 of the Representation of the People Act which runs thus:

"An order of the Tribunal under section 98, or section 99 shall not tale effect until it is published in the Gazette of India under section 106."

There is nothing in the Act nor in the Constitution which enables the Election Commission to adopt the order of the Tribunal and thus make it its own. On the other hand, sections 106 and 107 both make it clear that the function of the Election Commission in regard to the matter, after the decision of the Tribunal, is merely ministerial. If this Court quashes the order of the Tribunal, the very basis for the publication of the decision of the Tribunal will disappear and the Election Commission as a constitutional body will be bound to treat the petition as still pending and to take the necessary steps to have it decided. I may add that when this Court finds that an inferior Tribunal has committed an error pertaining to its jurisdiction and that consequently its order is unsustainable, it can itself quash the order of that Tribunal and that it can itself quash the order of that Tribunal and that it is not necessary for it to "issue a process" against it to quash its order. Indeed, where the High Court holds that an inferior Tribunal has usurped jurisdiction or erroneously refused to exercise it, it does not leave it to that Tribunal to quash its own order but the High Court itself quashes it. I am not

even aware of any case in which an inferior Court was directed to quash its erroneous order. Thus, the fact that the Tribunal is now *functus officio*—and may therefore be deemed to be non-existant—is of no consequence.

33. In my judgment, the Election Commission is not a necessary party to this petition because no relief is sought against it, and indeed, no relief need have been sought against it. As I have already observed, though under the provisions of the Representation of the People Act the Election Commission has got to perform certain functions in relation to election petitions and also in relation to the decisions of the election petitions, that fact is not sufficient to make the Election Commission a necessary party to a petition challenging the decision of the Election Tribunal. It may further be pointed out that the Election Commission was not a party to the election petition itself, and where an act of the Election Tribunal is challenged it is difficult to understand how the Election Commission becomes a necessary party to the petition.

34. At this stage I may refer to the argument advanced by Shri Pathak, senior counsel for the respondent No. 1, to the effect that the Election Commission having given the decision that certain voting papers were valid is interested in supporting that decision and is therefore necessary or atleast a proper party. What I have said above regarding the jurisdiction of this Court on the question of the interpretation of rule 47(1)(c) would also apply to the decision of the majority of the Tribunal in regard to the action taken by the Election Commission. Since the correctness or otherwise of the decision of the Tribunal on this point cannot be questioned before us, the Election Commission is neither a necessary nor a proper party to the petition.

35. Further, since the Election Commission is not a necessary party nor even a proper party to the petition, the fact that it is situate beyond the jurisdiction of this Court would not render the petition untenable.

36. During the course of the argument it was suggested that the Union Government was also a necessary party to the petition because our decision cannot be given effect to except through the instrumentality of the Government. It is true that under section 106 of the Representation of the People Act, the Election Commission is required to transmit copies of the order of the Tribunal to the Speaker of the House of the People and to cause it to be published in the Gazette of India and therefore the actual publication has to be ordered by the Government. It is also true that the Gazette of India is published under the authority of the Government of India and therefore the actual publication has to be ordered by the Government of India. These facts however are not sufficient to warrant or necessitate even the joinder of the Government of India as a party to the petition.

37. The best answer to the argument would be found in the judgment of Lord reading C. J. in *Rex* v. *Speven* (1916) I.K.? 595). In that case Sir Idger Speyer and Sir Ernest Cassel were called upon by two orders of the Court of the Kings Bench Division, made at the instance of Sir George Makgill, to show cause why an information in the nature of a *quo warranto* should not be exhibited against them to show by what authority they respectively claimed to be members of His Majesty's Privy Council for Great Britain. The Attorney-General, upon whom notice of the orders obtained by Sir George Makgill had been served, took the preliminary objection on behalf of the Crown that these proceedings were entirely misconceived and that this Court had no jurisdiction to entertain them. One of the grounds on which the objection was based was that no judgment in favour of the relator could be enforced because it would be an order upon the Crown. This ground was based on the assumption that if the Court were to pronounce a judgment of ouster in this case it would be making an order upon the Sovereign. Dealing with the argument Lord Reading observed:

> "If that were the true view of such a judgment I should, of course, agree, as this Court could not make an order upon the Sovereign. To use the words of Cockburn C. J. in *Reg* v. *Lords Commissioners of the Treasury* (L.R. 7 Q.B. 394).
>
> 'We must start with this unquestionable principle, that when a duty has to be performed (if I may use that expression) by the Crown, this Court cannot claim even in appearance to have any power to command the Crown; the thing is out of the question. Over the Sovereign we can have no power.'
>
> But a judgment against the respondents would have effect against them only; it would be an order upon the subject, not upon the Crown. It is then argued that this Court would be powerless to enforce a

judgment of ouster in this case, that we could not order the Clerk to the Privy Council, who is the servant of the King, to remove the names from the roll of Privy Councillors, neither could we prevent the immediate reinstatement of the names if the King thought fit to alter it. It is sufficient for the present purpose to say that a judgment pronounced in favour of the relator would not involve the making by this Court of an order upon the Clerk, neither would this Court be powerful to enforce the judgment if it were disobeyed by those against whom it was made. Although it may be interesting and useful for the purpose of testing the proposition under consideration to assume the difficulties suggested by the Attorney General, none of them would in truth occur. This is the King's Court; we sit here to administer justice and to interpret the laws of the realm in the King's name. It is respectful and proper to assume that once the law is declared by a competent judicial authority it will be followed by the Crown."

This Court derives its powers and jurisdiction with respect to inferior tribunals from the provisions of the Constitution itself and I have no doubt whatsoever that any decision given by this Court will be respected and given effect to by the appropriate authority or authorities.

38. What remains to be considered is the argument that the petitioner has no substantial right to assert and that no injustice has been done to him. The petitioner made the election petition and therefore he was entitled to have it decided according to law by the Election Tribunal. Upon the view I take the Election Tribunal has failed to exercise its jurisdiction by not determining the question which it was bound to determine and therefore it must be said that the petitioner has not been able to obtain justice. He has therefore a clear right to move this Court under article 227 of the Constitution.

39. I would, therefore, allow the petition and quash the order of the Election Tribunal and leave it to the Election Commission and the Government to perform their statutory duties in the matter of the election petition which has not been decided. The petitioner is entitled to the refund of the deposit made by him and also to his costs. No counsel's fee as no certificate has been filed.

PER BHUTT, J.

I have had the benefit of persuing the orders of my Lord the Chief Justice and my brother Mudholkar, J. With respect I would like to make the following observations:—

2. The points arising in this controversy are—

(1) Whether indepently of Article 329, the matter is justiciable either under Article 226 or 227?

(2) Whether, in view of Article 329, the matter is taken out of the jurisdiction of the High Court under Articles 226 and 227; if so, to what extent?

(3) Whether the decision of the Election Tribunal is without jurisdiction or in excess of jurisdiction; if so, is it liable to be quashed?

(4) Whether the Election Commission is a necessary party; if so, has the High Court no jurisdiction in the matter?

3. *Point* (1).—The real question in this connection is to determine precisely the respective limit of the power of the High Court under Article 226 and Article 227 of the Constitution. As was held by their Lordships of the Supreme Court in Election Commission *vs.* Saka Venkata Rao (A.I.R. 1953 S.C. 210), the power under Article 226 is conditioned by only two limitations, *viz.*:—

(i) that the power is to be exercised throughout the territories in relation to which the High Court exercises jurisdiction; and

(ii) that the person, authority or Government, to whom the writ is issued, is amenable to the High Court's jurisdiction either by residence or location within those territories.

In other respects the power of the High Court under this Article is unfettered. Since the pronouncement of the Supreme Court on the scope of the Article, the view held earlier in M.E.T. Co. *vs.* Ranganathan (A.I.R., 1952 Bom. 449), Maqbulunisa *vs.* Union of India (A.I.R. 1953 All. 477) and Ranganathan *vs.* M.E.T. Co. (A.I.R. 1952 Mad. 659), *viz.*, that the power is exercisable if the person, authority or Government functions, without physical location or residence, within the High Court's territorial jurisdiction cannot be regarded as law.

4. However wide the powers are under Article 226, they, by their very nature, can only be exercised within certain limits. In Verrappa *vs.* Raman & Raman Ltd. (A.I.R. 1952 S.C. 192) their Lordships of the Supreme Court observed:

> "Such writs as are referred to in Article 226 are obviously intended to enable the High Court to issue them in grave cases where the subordinate tribunals or bodies or officers act wholly without jurisdiction, or in excess of it, or in violation of the principles of natural justice or refuse to exercise a jurisdiction vested in them, or there is an error apparent on the face of the record, and such act, omission, error, or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it is not so wide or large as to enable the High Court to convert itself into a Court of appeal and examine for itself the correctness of the decisions impugned and decide what is the proper view to be taken or the order to be made."

These limits were applied in Parry & Co. Ltd. *vs.* Commercial Employees Association (A.I.R. 1952 S.C. 179). In this connection their Lordships observed:—

> "The Commissioner was certainly bound to decide the questions and he did decide them. At the worst, he may have come to an erroneous conclusion, but the conclusion is in respect of a matter which lies entirely within the jurisdiction of the Labour Commissioner to decide and it does not relate to anything collateral, an erroneous decision upon which might affect his jurisdiction. The records of the case do not disclose any error apparent on the face of the proceeding or any irregularity in the procedure adopted by the Labour Commissioner which goes contrary to the principles of natural justice. Thus there was absolutely no ground here which would justify a superior Court in issuing a writ of 'certiorari' for removal of an order or proceeding of an inferior tribunal vested with powers to exercise judicial or quasi-judicial functions."

In Rashid Ahmed *vs.* Municipal Board, Kairana (A.I.R. 1950 S.C. 163) their Lordships further observed:

> "There can be no question that the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs, but the powers given to this Court under Article 32 are much wider and are not confined to issuing prerogative writs only."

Similar considerations would prevail under Article 226.

5. From the rulings cited above, the following principle emerge, *viz.*:—

(i) Jurisdiction may be exercised where the tribunal—

(a) has acted wholly without jurisdiction or in excess of it;

(b) has refused to exercise a jurisdiction vested in it;

(c) has acted in violation of the principles of natural justice; or

(d) has committed an error apparent on the face of the record;

and such act, omission, excess or error has resulted in manifest injustice.

(ii) In exercising the jurisdiction the High Court is not empowered to convert itself into a Court of appeal and examine for itself the correctness of the decision and decide for itself what the proper view is or what order has to be made.

(iii) Where the tribunal has acted with jurisdiction, the High Court will not interfere on the mere ground that the decision is erroneous.

(iv) Where there is an alternative remedy under the statute, its existence will be taken into consideration before exercising jurisdiction.

6. In the cases referred to above, the tribunals are mentioned as inferior tribunals and the High Courts as a superior Court. The question whether under Article 226 of the Constitution, the High Court is empowered to issue writs only to subordinate or inferior tribunals, or whether the tribunals, by virtue of their location within the High Courts territorial limits, become amenable to its jurisdiction, was not, however, specifically raised or considered. The term 'inferior' or 'subordinate' has reference to a statute which may make the orders or proceedings of the tribunals concerned subject to the appellate or revisional authority or a Court. Article 226 however, does not specify that the High Court can exercise its power in respect of the orders or proceedings of such inferior or subordinate tribunals only. It appears that where a tribunal, however, wide or exclusive its powers, is constituted under a statute, it would be amenable to

the High Court's jurisdiction under Article 226, provided the two conditions mentioned above are fulfilled. The power of the High Court, in this regard, can only be taken away by the Constitution itself to the extent and in the manner provided therein either expressly or by necessary implication. No statutory finality attaching to the orders or proceedings of the tribunals can otherwise eliminate or abridge its power, subject, of course, to the limitations determined by the Supreme Court by its judicial decisions.

7. Turning to Article 227, the decisions holding the view that the term 'superintendence' used in clause (1) imports judicial control, although of a limited nature, are the following:—

(i) Sheoshankar *vs.* M.P. State Government (A.I.R. 1951, Nag. 58 F.B.);

(ii) Shankar *vs.* Returning Officer, Kolaba (A.I.R. 1952 Bom. 277); and reliance was also placed upon;

(iii) Shripad *vs.* Divatia (A.I.R. 1948 Bom. 20).

In the first two cases the interpretation is inferantial and is based on the omission from Article 227 of a clause similar to sub-section (2), section 224, of the Government of India Act, 1935. Although Article 227 is similar to section 224 of Government of India Act, such an interpretation cannot be given to it without first examining the scope of sub-section (1) of section 224 *vis-a-vis* clause (1) of Article 227. If this has to be done, one has to revert to the very question has to be answered.

8. One point of difference is remarkable in this connection, namely, that whereas section 224 provided for superintendence of the High Court over Courts which were subject to its appellate jurisdiction, Article 227 deals with the Courts or tribunals which are situate within the territories in relation to which the High Court exercises jurisdiction. Such Courts or tribunals cannot be amenable to the High Court's appellate or revisional jurisdiction simply because of their physical location. It, therefore, appears that in the former case, it was necessary to clearly delimit the power of the High Court lest, by virtue of its appellate jurisdiction, it may while purporting to act under the Government of India Act, exercise a power which was not vested in it under the relevant statute. It is in this context that sub-section (2) of section 224 of the Government of India Act has to be read, but for which sub-section (1) was liable to be used in a wider sense. No such extended jurisdiction is indicated in Article 227, and it is for this reason that no necessity was felt to incorporate in it a provision similar to sub-section (2) of section 224 of the Government of India Act. The judicial power, if any exercised by the High Court prior to the Constitution, while superintending a subordinate Court was not therefore referable to section 224 of the Government of India Act and was derived solely from its statutory jurisdiction. No such power of intervention can, therefore, be imported in Article 227 of the Constitution independently of appellate or revisional jurisdiction of the High Court vesting in it in terms of a statute.

9. As regards Shripad *vs.* Divatia (Supra), the matter had arisen before the commencement of the Constitution and was confined to the question whether the Election Commissioner appointed by the Governor under para. 4 of Part III of the Order in Council 1936 could be held to constitute a Court, in its extended sense, amenable to the writ jurisdiction of the High Court under section 45 of the Specific Relief Act, 1877. That decision can be no guide to the determination of the scope of Article 227. I, therefore, respectfully concur in the view of my Lord the Chief Justice that the power of the High Court under Article 227 is confined to administrative matter and does not extend to judicial intervention.

10. *Point* (2).—In order to understand the limitation imposed by Article 329 on the power of the High Courts under Article 226, it is first necessary to read and interpret the relevant provisions of the Constitution itself. It is only when any doubt or incongruity arises on giving a plain meaning to the words that are used, that the law or practice of foreign countries may prove useful as a guide but not as an authority. In this connection Articles 105(3), 324(1), 327 and 329(b) are relevant and are reproduced below:—

> "105(3). In other respects, the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House, shall be such as may from time to time be defined by Parliament by law, and, until so defined, shall be those of the House of Commons of the Parliament of the United Kingdom, and of its members and committees, at the commencement of this Constitution."

"324(1). The Superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President held under this Constitution, including the appointment of election tribunals for the decision of doubts and disputes arising out of or in connection with elections to Parliament and to the Legislatures of States shall be vested in a Commission (referred to in this Constitution as the Election Commission)."

"327. Subject to the provisions of this Constitution, Parliament may from time to time by law make provision with respect to all matters relating to, or in connection with, elections to either House of Parliament or to the House or either House of the Legislature of a State including the preparation of electoral rolls, the delimitation of constituencies and all other matters necessary for securing the due constitution of such House or Houses."

"329(b). Notwithstanding anything in this Constitution—

* * * * * *

No election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature."

11. Article 105(3) provides that except in the matters covered by clauses (1) and (2), the powers, privileges and immunities of each House of Parliament, and of the members and committees thereof, shall be such as may be defined by Parliament by law, and until so defined, shall be those of the House of Commons, in the United Kingdom, and of its members and committees at the commencement of the Constitution. This article obviously does not, in terms, apply to the conduct of election, in so far as the powers, privileges and immunities of the House and its members and committees, come into existence only after the election has taken place and the House is constituted. There is, however, another aspect of the matter.

12. In England, before the year 1770, controverted elections were tried and determined by the whole House of Commons. Subsequently the House consented to submit the exercise of its privilege to a tribunal constituted by law and composed of its own Members. The principle of selection of these Members was by lot of committees for the trial of election petitions. This practice prevailed until 1868 when the jurisdiction of the House was transferred by statute to the Courts of law. Since 1949 the settlement of these disputes is governed by the Representation of the People Act, 1949, under which the trial of controverted elections is entrusted to judges selected from the judiciary, the judges being selected from a rota to be constituted for the purpose. Petitions complaining of undue elections and returns or of corrupt or illegal practices are presented in England to the King's Bench Division of the High Court and are tried by two judges of that court within the country or borough concerned. Similar provision exists for the trial of the petitions in Scotland and Northern Ireland where they are presented respectively to the Court of Sessions in Scotland and the High Court in Northern Ireland. The House has no cognisance of these proceedings which do not form a proceeding of the House. It comes to know of the determination only after it is certified, in writing, to the Speaker by the judges. The decision, subject to the result of an appeal on a question of law, which can be filed only by special leave of the High Court, becomes final and has then only to be registered by the House.

13. It will thus be seen that the House of Commons has divested itself completely of its own privileges of deciding controverted elections. This privilege being non-existent at the time of the commencement of the Constitution, cannot vest in either House of Parliament in India under Article 105(3). It may, however, be contended that in the United Kingdom the power of the judges has been delegated by the House of Commons itself, and, therefore does not cease to vest ultimately in the House. Such a position may exist in the United Kingdom where the Parliament is Supreme. In India the Parliament derives its power from the Constitution and its legislative function is limited to enumerated items. Unless, therefore, the Constitution itself vests any privilege in the Parliament, either expressly or by a necessary implication, it cannot be claimed by either of the Houses. As I read Article 105(3) of the Constitution, it appears to me that only the powers, privileges and immunities actually exercised or enjoyed by the House of Commons at the commencement of the Constitution are contemplated by it

and not those which the House of Commons has abdicated. Even if such of the powers as were given up are subsequently resumed by the House of Commons, they would not vest in the Houses of Parliament in India for they were not existing at the commencement of the Constitution. Nor would they vest in them solely for the reason that they inhered in the House of Commons before the Constitution commenced. The idea underlying Article 105(3) in co-relating the matter to the date of the commencement of Constitution is clearly to take notice of only such of the powers, privileges and immunities as the House of Commons exercised or enjoyed at that date. If the intention was to vest in the House of Parliament in India all those powers, privileges and immunities which, at one time or the other, vested in the House of Commons since the dawn of history, nothing was easier than to state so expressly. It would, therefore, appear that the power to decide controverted elections does not vest in the Houses of Parliament in India by virtue of Article 105(3).

14. Article 324(1) provides that the superintendence, direction and control of all elections to Parliament shall be vested in a Commission (called the Election Commission). The power of the Commission also includes the appointment of election tribunals for the decision of doubts and disputes arising out of or in connection with elections. It will thus appear that the Commission itself cannot determine controverted elections and its power in regard to election tribunals does not extend beyond appointment of its members. It is the Representation of People Act, 1951, that makes a provision for the constitution of Election Tribunals. This Act is passed by Parliament in exercise of its power under Article 327 which is subject to the provisions of the Constitution. Due administration of the Act in the matter of controverted elections is, therefore, subject to the power of the High Court under Article 226 limited, as it may be, to the extent provided by Article 329. It would, in my opinion not be correct to hold that Article 327 is only subject to the preceding Articles 325 and 326 and not to other provisions of the Constitution, for that would be reading in the words "Subject to the provisions of this Constitution" a limitation which is not explicit or implicit in the expression.

15. In this connection it appears to me that an enquiry into the question whether an Election Tribunal is an inferior, or superior or independent, tribunal is not necessary. As already observed, the jurisdiction of the High Court under Article 226 is not dependent on the inherent status of the tribunal but on its location within its territorial limits. I also think that Article 226 does not make any distinction between a tribunal of exclusive or of limited jurisdiction. However, in this connection I do not think that the Election Tribunal is to be deemed to be possessing limited jurisdiction because it is constituted for a limited purpose. Whether or not a Tribunal has limited or exclusive jurisdiction does not depend upon the limit of the subject-matter allotted to it for adjudication but upon the extent of the jurisdiction conferred on it to decide it. As was pointed out by their Lordships of the Supreme Court in N. P. Ponnuswami *v.* Returning Officer, Namakkal (A.I.R. 1952 S.C. 54) the Representation of the People Act, 1951, "is a self-contained enactment so far as elections are concerned, which means that whenever we have to ascertain the true position in regard to any matter connected with elections, we have only to look at the Act and the rules made thereunder". Section 105 of the Act provides that every order of the Tribunal shall be "final and conclusive". Section 107 takes away from the jurisdiction of Civil Courts any action taken or any decision given by the Returning Officer or by any other person appointed under the Act in connection with an election. It is difficult to conceive in these circumstances how the Tribunal can be deemed to be possessed of only limited jurisdiction in the matter of deciding controverted elections.

16. Even in the case of inferior tribunals the rule to determine whether the jurisdiction conferred by a statute is limited or exclusive has been stated by Lord Esher M. R. in Rex *v.* Income Tax Special Purposes Commissioner [(1888) 21 Q.B.D. 313 at p. 319] thus:

> "When an inferior court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they

have acted without jurisdiction. But there is another state of things which may exist. The legislature may entrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or to something more. When the legislature are establishing such a tribunal or body with limited jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts including the existence of the preliminary facts, on which the further exercise of their jurisdiction depends and if they were given jurisdiction to decide, without any appeal being given, there is no appeal from such exercise of their jurisdiction."

Even if this test is applied, the Election Tribunal would be found to possess exclusive jurisdiction to decide election disputes. However, it appears to me that even if its jurisdiction be exclusive and may, therefore, be taken out of the purview of Civil Courts of the country, it cannot be so exclusive as to oust the jurisdiction of the High Court under Article 226 except to the extent provided in Article 329.

17. Coming to the question of the superior of independent status of the Election Tribunal, it has to be kept in mind that the Tribunal is a creature of a statute enacted by Parliament in exercise of powers which are subject to the provisions of the Constitution. Such an enactment cannot override the constitutional power of the High Court under Article 226 except in so far as it is hit by Article 329. The cases cited in this connection at the Bar are easily distinguishable and at any rate are not helpful in determining the scope of Article 226.

18. In Goonesinha *v.* De Kretser (A.I.R. 1945 P.C. 83), in which the observations in The Queen *v.* The Judges and Justices of the Central Criminal Court [(1883) 11 Q.B.D. 794] were approved by the Judicial Committee, their Lordships were dealing with the case of an election dispute which was decided under the Ceylon (States Council Elections) Order in Council, 1931, by a Judge of the Supreme Court from whose decision there was no appeal. It was held that the cognisance of the Election petitions under the Order in Council was an extension of, or addition to the ordinary juri diction of the Supreme Court and consequently the Supreme Court could not grant *certiorari* to bring up any order made in the exercise of that jurisdiction. The position of the High Court *vis-a-vis* the Election Tribunal is not of such a character and if it cannot, to any extent, exercise jurisdiction over its order or proceeding, it would be by virtue of the limitation imposed by the Constitution itself under Article 329 and not because of the status of the Tribunal.

19. Theberge *v.* Laudry [(1876) 2 A.C. 102] was a case where formerly the decision of controverted elections was vested or was retained in its own hands by the Legislative Assembly of the Province, which was by an Act of the Quebec Legislature of 1872 transferred to Judges. That act was repealed by an Act of Parliament in 1875, which vested the decision in the Supreme Court. The Lord Chanceller delivering the judgment observed:

"Their Lordships wish to state distinctly, that they do not desire to imply any doubt whatever as to the general principle, that the prerogative of the Crown cannot be taken away except by express words; and they would be prepared to hold, as often has been held before, that in any case where the prerogative of the Crown has existed, precise words must be shown to take away that prerogative. But, in the opinion of their Lordships, a somewhat different question arises in the present case. These two Acts of Parliament, the Acts of 1872 and 1875, are Acts peculiar in their character. They are not acts constituting or providing for the decision of mere ordinary civil rights; they are Acts creating an entirely new, and up to that time unknown, jurisdiction in a particular Court of the colony for the purpose of taking out, with its own consent, of the Legislative Assembly, and vesting in that Court, that very peculiar jurisdiction which, upto that time, had existed in the Legislative Assembly of deciding election petitions and determining the status of those who

claimed to be members of the Legislative Assembly. A jurisdiction of that kind is extremely special, and one of the obvious incidents or consequences of such a jurisdiction must be that the jurisdiction, by whomsoever it is to be exercised, should be exercised in a way that should as soon as possible become conclusive, and enable the Constitution of the Legislative Assembly to be distinctly and speedily known."

In India the decision of controverted elections never was vested in the Houses of Parliament and has also not been vested in them by the Constitution. Nor is the decision impugned given by a Tribunal of the status of a Supreme Court of a State. And this makes all the difference.

20. Theberge *Vs.* Laudry (supra) was followed in Strickland *Vs.* Grima (1930 A.C. 285) in which the question was whether the decision of the Court of Appeal in Malta in a case of election to the Senate was subject to an ordinary incident of an appeal to the Crown. The decision of the Privy Council solely turned on the question whether the Court of Appeal was, in an election case, an ordinary Court or a special tribunal, and their Lordships held that it was a special tribunal under the terms of Article 33 of the Malta Constitution Letters Patent, 1921, without annexing to it the ordinary incident of an appeal to the Crown. The decision, therefore, turned on a point which does not arise in the instant case. Here there is no question of a right of an appeal as in the case of Strickland *Vs.* Grima (supra), or special leave to appeal as in the case of G.E. De Silva *Vs.* Attorney-General of Ceylon (A.I.R. 1919 P.C. 261).

21. Turning to Wi Matua's Will In re (1908 A.C. 448) the question was whether a petition lay to His Majesty for leave to appeal from a decision of a Native Appellate Court in New Zealand which under section 93 of New Zealand Act 58 vid., No. 43, declared that the decisions of the Native Appellate Court established thereby shall be "final and Conclusive" but did not expressly exclude his Majesty's prerogative. Lord Robertson delivering the judgment observed:

> "Turning to the present case, their Lordships have to deal with rights which are the ordinary legal rights of subjects of the King. The legal rights of this particular people in the matters of land, succession, and probate are subjected to the newly created tribunal. But for the creation of this Court the Law Courts would have had to determine those rights as best they could, and an appeal would clearly have lain to His Majesty. The exclusion of the right to appeal to His Majesty would therefore be a forfeiture of existing rights on the part of Sovereign and subject."

This decision, therefore, turned upon the view that the exclusion, in the Act, of the right to appeal to His Majesty in a matter of legal right to land, succession and probate, from which an appeal would have ordinarily lain if the list, was tried by the Law Courts amounted to forfeiture of this right on the part of Sovereign and subject. Here there is no forfeiture of a right or power under Article 226 except to the extent that it is circumscribed by Article 329.

22. The decision in Wolverhampton New Water Works Co. *Vs.* Hawkesord [(1859) 60 B. (N.S.) 336] which has been cited with approval in many cases and recently also by their Lordships of the Supreme Court in N. P. Ponnuswami *Vs.* Returning Officer, Namakkal (supra) provides that where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it, the form of the remedy given by the statute must be adopted and adhered to. This principle has not been violated in the instant case as the petitioner had pursued the remedy provided in the Representation of the People Act, 1951. There is, however, another question to be answered viz., whether Article 226 of the Constitution, which overrides the limitations imposed by any statute law, provides any further remedy to an aggrieved party. This question is not governed by the decision in Wolverhampton New Water Works Co. *Vs.* Hawkesford (supra).

23. The real question to determine in the instant case is the extent to which the power of the High Court under Article 226, otherwise untrammelled, is abridged by Article 329(b). What clause (b) of Article 329 excludes from the jurisdiction of the Courts, including the High Court, is the calling into question an election. What follows further in the Article only indicates the forum and the manner for the determination of controverted elections. The governing part of the Article so far as the power of the High Court under Article 226 is concerned, is, however, the exclusion from its jurisdiction of all matters which affect the result of an election. If, therefore, a petition under Article 226 raises any matter of this nature, it would not be within the cognisance of the High Court.

24. In the case of N. P. Ponnuswami *v.* Returning Officer, Namakkal (Supra) their Lordships of the Supreme Court were considering two questions, *viz.*,—

(i) Whether rejection or acceptance of a nomination paper was included in the term "election", and

(ii) Whether the matter was justiciable under Article 226 of the Constitution.

Their Lordships answered the first point in the affirmative. In this connection they observed that the term "Election" is used in a wide sense and embraces the entire procedure to be gone through to return a candidate to the legislature, whether or not it be found necessary to take poll. On the second point they held that the law of elections in this country does not contemplate two attacks on matters connected with election proceedings, one while they are in progress and the other after they have been completed by an election petition. The same view was expressed by M. Smith J. in Waygood and another *v.* James [21 L.T.R. (N.S.) 202 at p.204] on a construction of the provisions of 31 and 32 Vict. c. 125, which were similar to those of the Representation of the People Act, 1951. The questions was thus disposed of by their Lordships of the Supreme Court on this short ground and the question "as to what the powers of the High Court under Article 226 and 227 of the Constitution may be" was left to be decided "on a proper occasion". However, it was held by their Lordships that the question relating to a nomination paper, which is an electoral matter, was liable to be considered by an Elecetion Tribunal under Article 329 to the exclusion of all Courts including the High Court. It could not have been the intention of the Constitution to make the exclusion effective at one stage and not at another. In my opinion, the plain words of Article 329 mean nothing else than that the exclusion of the jurisdiction of all Courts, including the High Court, in electoral matters is absolute and complete, and the provision of a machinery for determining them does not indicate that such matters become justiciable after the remedy provided in the Article is exhausted.

25. In this connection, I would like to stress that the question of jurisdiction is one of Substance as was held by the Judicial Committee in Ryots of Garabandho *v.* Zamindar of Parlakimedi (A.I.R. 1943 PIC. 164) and cannot be made to depend upon changing circumstances. In determining jurisdiction, one is not to be guided merely by the words in which the relief is couched but has to penetrate the "cloud of words"—to borrow with utmost respect the expression used by their Lordships of Privy Council in Raleigh Investment Co. Ltd. *v.* Governor-in-Council (74 I.A. 50 at p.62)—and ascertain the substance of the action.

26. In the instant case there can be no doubt that the relief of declaration that the first respondent's election is void and that the petitioner has been duly elected offends against Article 329(b) and cannot be granted. The question is regarding the relief of writ of *certiorari*. It was contended that even if the order of the Election Tribunal is vacated, it would not affect the result of election and, therefore, the action is not hit by Article 329(b). However, it appears to me that wide as the import of the term "election" is as has been held in N.P. Ponnuswami *v.* Returning Officer, *Namakkal (supra)*, any interference which has the effect of reopening an enquiry into any electoral dispute would amount to calling into question the election within the meaning of Article 329(b). In this view it is not necessary to consider the question whether the term "election" extends upto the conclusion of the proceedings before an Election Tribunal. This question was answered in affirmative in Ramkrishna *v.* Thakur Daoosingh (A.I.R. 1953 Nag. 458) but it does not appear to be necessary to go as far as that for determining the present controversy. Even if it be held that the election ends within the meaning of Representation of the People Act, 1951, with the announcement of the result by the Returning Officer and that the process of the election petition only determines the controverted issues and does not extend the terminal point of the election, it appears to me that if the proceedings once concluded are reopened, it is tantamount to deciding, although indirectly, that the election was not proper. Article 329(b) obviously excludes such an interference by the High Court.

27. However, giving the fullest amplitude to Article 329 (b) of the Constitution, there may still be cases where the power of the High Court under Article 226 may not be excluded. Such may, for instance, be jurisdictional or procedural difections by the Tribunal during the conduct of the proceedings, which may seriously prejudice the course of the trial. Or there may even be a case where the order of the Tribunal is so patently and manifestly subversive of its real intendment that to give effect to its own decisions may not amount to interference with the election. Interference in such cases may not violate and may even subverse the purpose of Article 329(b), and it is possibly such cases that their

Lordships had in mind when they expressed themselves in favour of the power of the High Courts, even if limited, to interfere with the proceedings or orders of the Tribunal. [See Jamnaprasad *v.* Lachhiram (A.I.R. 1953 M.B. 197), Shankar *v.* Returning Officer Kolaba (Cit. sup.) and Sivathanu *v.* Kumara (A.I.R. 1953 Trav-C 274)]. I would, however, leave the consideration of such cases for a suitable occasion.

28. *Point* (3).—The majority of the Tribunal have found that the impugned votes could not be validated by the Election Tribunal. They had power to decide this point, whether rightly or wrongly, and accordingly the majority decision thereon is not liable to challenge in these proceedings. What was contended by the learned counsel for the petitioner was that in so far as the case was one of invalid votes, the Tribunal ought to have rejected them under section 101 of the Representation of the People Act, 1951, and not decided the matter with reference to section 100(2) (c) *ibid.* It was also contended that the Tribunal's interpretation of the expression "materially affected" in section 100(2) (c) is manifestly erroneous. For these reasons it was urged that the action of Tribunal in applying section 100(2) (c) of the Act to the instant case by wrongly interpreting its meaning and import, amounts to usurption of jurisdiction which did not vest in it under the law.

29. It appears to me clear that being empowered to decide the dispute, the Tribunal had jurisdiction to adjudicate by what provision of the Representation of the People Act, 1951, the matter in controversy was governed. Its decision on the point may be erroneous, but would not amount to wrongful assumption or abdication of jurisdiction. Similarly, after deciding that the matter was governed by section 100(2) (c), it had also jurisdiction to decide what the phrase "materially affected" implied. Its interpretation may again be wrong but as already stated, an erroneous decision with jurisdiction is not open to attack in proceedings under Article 226 of the Constitution. There has also been no manifest injustice in the case in so far as it was nobody's case that the voters would have voted differently if correct ballot papers were issued. This matter has been dealt with at length by my Lord the Chief Justice in his order and I am in humble agreement with his observations on the point.

30. *Point* (4).—I respectfully agree with my brother Mudholkar J. that so far as the instant case is concerned, the Election Commission is not a necessary party. It had merely registered the decree of the Tribunal as a routine matter and is not obviously interested in the result of the election. Under Section 105 of the Representation of the People Act, 1951, finality is attached to the Tribunal's order. What section 107 prescribes is only the date from which the said order becomes effective. No judicial sanctity is, therefore, attached to the publication of the order the Gazette of India. It is apparent that once the order itself is vacated, the publication in the Gazette of India would be ineffective. As no interference with the publication would be necessary, the Election Commission, which can be trusted to do its duty if the Tribunal's order be quashed, is not a necessary party. For similar reasons the Government of India also is not a necessary party.

31. However, it should not be understood that in no case would it be necessary to join the Election Commission. In a case where an election Commission proceeds to take steps to hold a fresh election, it may perhaps be necessary to implead the Commission in the proceedings in order to give relief to the petitioner. In such an event, it would be a question if the petition can be entertained, as an authority which is beyond the territorial limits of the High Court's jurisdiction would be involved. My opinion on the point is, therefore confined to the facts of the instant case.

32. I would, therefore, dismiss the petition but in the circumstances of the case without costs. The outstanding amount of the security be refunded to the petitioner.

PER B. P. SINHA. C. J., J. R. MUDHOLKAR & G. P. BHUTT. JJ.:—

According to the majority opinion of the Bench, this application is dismissed but in the circumstances without costs. The petitioner is entitled to a refund of the outstanding amount of his security.

[No. 19/180/52-Elec.III/19981.]

By Order,
K. S. RAJAGOPALAN, Asst. Secy.

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